FILED

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1942

## No. 870

GORDON KIYOSHI HIRABAYASHI,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF OF THE STATES OF CALIFORNIA, OREGON AND WASHINGTON AS AMICI CURIAE.

ROBERT W. KENNY,
Attorney General of the State of California,
600 State Building, San Francisco, California.

I. H. VAN WINKLE,
Attorney General of the State of Oregon,
Salem, Oregon,

SMITH TROY,
Attorney General of the State of Washington,

FRED E. LEWIS,
Chief Assistant and Acting Attorney General of the State of Washington,
Olympia, Washington,

*Attorneys for said States as Amici Curiae.*

PAUL WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

## Subject Index


| | | Page |
|---|---|---|
| Preliminary Statement | | 1 |
| The Interest of the States of California, Oregon and Washington | | 3 |
| The Essential Question | | 7 |
| The Argument | | 7 |
| I. | The military situation on the Pacific Coast | 9 |
| II. | The characteristics of the Japanese population within Pacific Coast military areas | 11 |
| | A. Japanese nationalistic organizations of the Pacific Coast | 12 |
| | B. Indoctrination of American Japanese in Japan | 18 |
| | C. The significance of the Issei | 20 |
| | D. Japanese language schools | 22 |
| | E. Dual citizenship | 24 |
| | F. Emperor worship—Shintoism | 25 |
| | G. The prospect of a fifth column | 26 |
| | H. Danger of sabotage | 27 |
| | I. Internal security threatened by anti-Japanese disturbances | 31 |
| III. | The action taken | 32 |
| | A. The curfew and exclusion orders, applied on a group basis within the military areas, were conceived in good faith in the face of emergency and were directly related to the mission of the Commanding General in defending the Pacific Coast and preventing sabotage and espionage | 36 |
| | B. The military commander as a matter of law was entitled to employ the precautionary and preventive measures of curfew and exclusion without conducting individual hearings | 43 |
| IV. | In time of war may the military authorities exercise controls over civilians resident within the States | 47 |

Page

A. Martial law in time of war ..... 49
B. Exclusion without a preliminary hearing as a proper exercise of martial law ..... 51
C. The English Courts have upheld validity of excluding persons from vital war zones ..... 55
D. The decisions of the District Courts ..... 58
E. Martial law by the test of necessity may be limited ..... 60
F. A declaration of martial law is not required ..... 62
G. The test of necessity ..... 63

V. Extent of judicial review of action taken by military authority ..... 69

VI. Congress had the power to enact Public Law 503 in aid of the President's power as Commander-in-Chief and that of his subordinate commanding generals to make rules pertaining to the conduct of civilians in prescribed military areas ..... 72

A. Public Law 503 did not delegate authority to the President ..... 72
B. If Public Law 503 is considered as a delegation, such delegation was not unconstitutional ..... 76
C. Ratification of curfew and exclusion orders by Congress ..... 81
D. Public Law 503 is not invalid on the ground of uncertainty ..... 82

Summary ..... 84

## Table of Authorities Cited

### Cases


| | Pages |
|---|---|
| Akira Ono v. United States, 267 Fed. 359, 362 (1920) | 14 |
| Avent v. United States, 266 U. S. 127 (1924) | 78, 79 |
| Boyle, In re, (Idaho, 1899) 57 Pac. 706 | 53, 61 |
| Brown v. Piper, 91 U. S. 37 (1875) | 8 |
| Campbell v. Chase National Bank, 5 Fed. Supp. 156 (1933) (DCSD-NY) | 80 |
| Chun Kock Quon v. Proctor, 92 Fed. (2d) 326, 330 (1937-CCA-9) | 18 |
| Clark v. United States, 99 U. S. 493, 495 (1878) | 8 |
| Commercial Cable Co. v. Burleson, 255 Fed. 99 (1919) (DCSD-NY) | 68 |
| Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. St. 165, 55 Atl. 952 (1903) | 61 |
| Cox v. McNutt, 12 Fed. Supp. 355 (1935) (Ind.) | 53 |
| Dakota Cent. Tel. Co. v. State, 250 U. S. 163, 39 S. Ct. 507 (1919) | 77 |
| Daniels v. Tearney, 102 U. S. 415, 419 (1880) | 8 |
| Edwards v. California, 314 U. S. 160, 173 (1941) | 22 |
| Farrington v. Tokushige, 11 Fed. (2d) 710 (CCA-9, 1926) | 11 |
| Greene v. Secretary of State for Home Affairs (1942) 1 A.C. 284 | 58 |
| Greeson v. Imperial Irr. District, 59 Fed. (2d) 529, 530 (CCA-9, 1932) | 8 |
| Hamilton v. Kentucky Distilleries, etc., 251 U.S. 146, 40 S. Ct. 106 (1919) | 77 |
| Hoyt v. Russell, 117 U. S. 401, 404 (1886) | 8 |
| Kanai, Ex parte, 46 Fed. Supp. 286 (D.C., Wisc., July 29, 1942) | 58 |
| King v. Governor of Wormwood Scrubbs Prison (1920) 2 K.B. 305 | 56 |
| Liebmann, Ex parte (1916), 1 K.B. 268, 274-5, 278 | 27 |
| Liversidge v. Anderson (1942), 1 A.C. 206 | 57 |
| Martin v. Mott, 12 Wheat. 19, 30 (1827) | 77 |
| McDonald, Ex parte, 49 Mont. 454, 143 Pac. 947 (1914) | 53, 61 |

Pages
McKinley v. United States, 249 U.S. 397 (1919).....77, 80
Meryman, Ex parte, 9 Am. L. R. 524, 17 Fed. Cas. No. 9487 (1861) ..... 52
Milligan, Ex parte, 4 Wall. 2 (1866).....39, 49, 52, 63, 65, 66, 68
Mitchell v. Harmony, 13 How. 115 (1851)..... 36
Moyer, In re, 35 Colo. 154, 85 Pac. 190 (1904)..... 52
Moyer v. Peabody, 212 U.S. 78 (1909).....38, 44, 47, 52
Ozawa v. United States, 260 U.S. 178 (1922).....20, 21
Rex v. Halliday (1917), 1 A.C. 260, aff. (1916) 1 K.B. 238..55, 58
Shimola v. Local Board, 40 F. Supp. 808 (D.C., Ohio, 1941) 49
Sterling v. Constantin, 287 U.S. 378 (1932).....7, 44, 69
Stewart v. Kahn, 11 Wall. 493 (1870).....38, 44, 47
United States ex rel. Quirin v. Cox, 87 L. Ed. 1 (U.S. Sup. Ct., Oct. 29, 1942)..... 47
United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).74, 76
United States v. Grimaud, 220 U.S. 506 (1911)..... 80
United States v. Hirabayashi (D.C., Wash.) 46 Fed. Supp. 657 (1942) .....11, 21
United States v. Korematsu, D.C., N.D. Cal., S.D., No. 27635-W (1942) ..... 3, 60
United States ex rel. Wessels v. McDonald, 265 Fed. 754 (1920) ..... 66
United States v. Wright, 48 Fed. Supp. 687 (Jan. 1943).... 77
United States v. Uhl, 46 Fed. Supp. 688 (1942)..... 71
United States v. Yasui, D.C., Ore., No. 16056 (CCA-9, No. 10,317) .....2, 3, 39, 62
Ventura, Ex parte, 44 Fed. Supp. 520 (1942) (DCWD. Wash. N.D.) .....60, 69
Zimmerman v. Walker, 132 Fed. (2d) 442 (1942)..... .....10, 26, 64, 66, 70, 71

## Statutes, Proclamations, Orders, Reports

California Constitution, Art. V, Sec. 21..... ..... 45
Census of United States, 1940 (16th), Population, 2nd Series, Dept. of Commerce..... 20
Census Bureau (unpublished information)..... 21
Civilian Exclusion Order No. 57 (May 10, 1942)..2, 35, 72, 79, 80

Constitution of United States: Pages
Art. I, Sec. 8, Cls. 1, 11 ..... 47
Art. I, Sec. 8, Cl. 13 ..... 47
Art. I, Sec. 8, Cl. 14 ..... 47
Art. I, Sec. 8, Cl. 18 ..... 47
Art. IV, Sec. 4 ..... 47, 51
Fifth Amendment ..... 82
Sixth Amendment ..... 82

Emergency Powers (Defence) Act of 1939 (2 and 3 Geo. VI, c. 62) ..... 57
Executive Order 9066 (U.S.C. Cong. Ser. No. 2, p. 157) Feb. 19, 1942 ..... 32, 48, 62, 82
Executive Order 9102 (U.S.C. Cong. Ser. No. 3, p. 265, March 18, 1942) ..... 31

Field Service Regulations—Operations, War Department, May 22, 1941 (Wartime Bulletin PM100-5) ..... 9

House Select Committee Investigating National Defense Migration (Tolan Committee)

Hearings:

Part 29, San Francisco, Feb. 21 and 23, 1942 ..... 12, 18, 19, 20, 22, 28, 30, 44
Part 30, Portland and Seattle, Feb. 26 and 28, and March 2, 1942 ..... 29, 31, 85

Reports:

Preliminary Report (H.R. 1911, 77th Cong., 2nd Sess., March 19, 1942) ..... 42
Final Report (H.R. 2124, 77th Cong., 2nd Sess., May 1942) ..... 25, 87, 88

Immigration Law of 1924, 8 U.S.C. 213 ..... 21
Imperial Ordinances Nos. 261 and 262 ..... 24

Japanese Nationality Law of 1924, Act XX-2 ..... 24
Judicial Code, Sec. 239 (28 U.S.C. Sec. 346) ..... 2

Public Law 503 (77th Cong., 2nd Sess., ch. 191; 18 U.S.C. Sec. 97A) ..... 34, 58, 59, 60, 72, 73, 76, 79, 82, 87
Public Proclamation No. 1 (March 2, 1942, 7 Fed. Reg. 2320) ..... 33, 34, 81
Public Proclamation No. 2 (March 16, 1942, 7 Fed. Reg. 2405) ..... 34, 81

Pages

Public Proclamation No. 3 (March 24, 1942, 7 Fed. Reg. 2543) ..... 2, 35
Public Proclamation No. 4 (March 27, 1942, 7 Fed. Reg. 2601) ..... 35
Public Proclamation No. 7 (June 8, 1942, 7 Fed. Reg. 3062) 35
Public Proclamation No. 10 (Aug. 5, 1942, 7 Fed. Reg. 6631) ..... 6, 73
Public Proclamation No. 12 (Oct. 10, 1942, 7 Fed. Reg. 8377) ..... 61, 73
Public Proclamation No. 16 (March 17, 1943, 8 Fed. Reg. 3256) ..... 33

Robert's Commission ..... 27

12 Stat. 755 (1863) ..... 64
55 Stat. 795, 77th Cong., 2nd Sess., c. 561 ..... 9

Un-American Activities in California, Report of Joint Fact-Finding Committee (Tenney Committee) to California Legislature (1943) ..... 19

## Texts and Encyclopedia

American Council Paper No. 5, p. 187, American Council, Institute of Pacific Relations, 129 E. 52nd St., N.Y. ..... 19

Bishop, New Criminal Law, 8th Ed., Sec. 53 (1892) ..... 61

Fairman, The Law of Martial Rule (1930) ..... 49, 51, 55, 62, 67
Fairman, The Law of Martial Rule, San Francisco Chronicle, March 4, 1942, p. 14 ..... 62
Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. R. 1254 (June 1942) ..... 46, 58, 63
Federalist, XXIII ..... 36

Glenn, The Army and the Law, 188-190 ..... 67
Graham, Martial Law in California, 31 Cal. L. R. 6 (Dec. 1942) ..... 51
Grew, Report from Tokyo, Simon & Schuster, N.Y. (1942) 18

History of the Japanese in America—Zaibei Nippon Zin Shi (1940) ..... 23
Holton, The National Faith of Japan (1938) ..... 25
Hughes, War Powers Under the Constitution, Reports of A.B.A., 1917, p. 248; Sen. Doc. No. 105, 65th Cong., 1st Sess. ..... 68, 81, 88

Pages

Jones, Evidence (2d Ed., 1908) p. 105 ..... 8

Matsuo, Kinoaki, The Three ' Alliance and a United States-Japanese War (1940); translation by Kilsoo K. Haan, How Japan Plans to Win, Little-Brown & Co., Boston (1942) ..... 27

Pollock, Expansion of the Common Law, pp. 105-106 ..... 51
Pollock, Law Quarterly Review, Vol. XVIII, p. 152 (1904) 66

Sandburg, Abraham Lincoln, Vol. II, p. 167 ..... 89

Warren, War-time Martial Rule in California, Cal. State Bar Jr., July-August 1942, pp. 185, 201-202 ..... 86
Wiener, A Practical Manual of Martial Law (1940) ...51, 54, 63
Wigmore, Evidence (3d Ed., 1940) Sec. 2567a ..... 8
Willoughby, Constitutional Law (2nd Ed.) III, 1602 ..... 67
Winthrop, Military Law and Precedents, Reprint, p. 820..51, 61

## Miscellaneous

Canadian Gazette, Extra No. 96, Aug. 31, 1942 ..... 57
Congressional Record, March 19, 1942, pp. 2804, 2807, unbound ed. (H.R. 1906, 77th Cong., 2nd Sess., pp. 2-3) ...74, 82
Long Beach Press-Telegram, Dec. 8, 1942 ..... 41
Los Angeles Times, May 19, 1942 ..... 37
Los Angeles Times, Dec. 9, 1942 ..... 41

New World Sun (Japanese language newspaper, S.F., Calif.) .....16, 23, 26

Opinion NS4826 of Attorney General of California (April 2, 1943) ..... 61

San Francisco Call-Bulletin, Dec. 7, 1942 ..... 40
San Francisco Examiner (Wash. Bureau), April 30, 1943.. 41
San Francisco Examiner, May 1, 1943 .....42, 45
San Francisco Recorder, Dec. 9, 1942 ..... 60
Seattle Post-Intelligencer, Dec. 9, 1942 ..... 41
Secretary of War, Letter to Lieutenant General J. L. DeWitt (Feb. 20, 1942) ..... 33
Ships' Manifests, filed at San Francisco, Seattle and Los Angeles Port Offices of the Federal Immigration and Naturalization Service, Dept. of Commerce ..... 18

## Charts

Chart 1. Military Areas Nos. 1 and 2.....Opp. p. 3

Chart 2. Elevated Japanese population map of U. S...Opp. p. 4

Chart 3 Japanese population map of Washington, Oregon and California.....Opp. p. 11

Chart 4. Age and Sex Composition of the Japanese Population: 1940 .....Opp. p. 21

Chart 5. Coastline of Santa Barbara County showing proximity of Japanese-held properties to military establishments and prospective landing beaches and airports .....Opp. p. 31

Chart 6. Coastline of San Diego County with reference to location of Japanese-operated farms and households .....Opp. p. 32

## Appendix

Page

Chart 7. Seattle metropolitan area with reference to location of military and naval installations, defense plants and utilities. ..... ii

Chart 8. Japanese population of San Francisco area with relation to military installations and national defense plants and utilities..... iii

Chart 9. Japanese population of Los Angeles metropolitan area with reference to military and naval installations and national defense plants and utilities..... iv

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

## BRIEF OF THE STATES OF CALIFORNIA, OREGON AND WASHINGTON AS AMICI CURIAE.

The States of California, Oregon and Washington file this brief as *amici curiae* in support of appellee for the purpose of presenting to this honorable Court their position concerning some of the important questions of fact and law involved upon this appeal.

### PRELIMINARY STATEMENT.

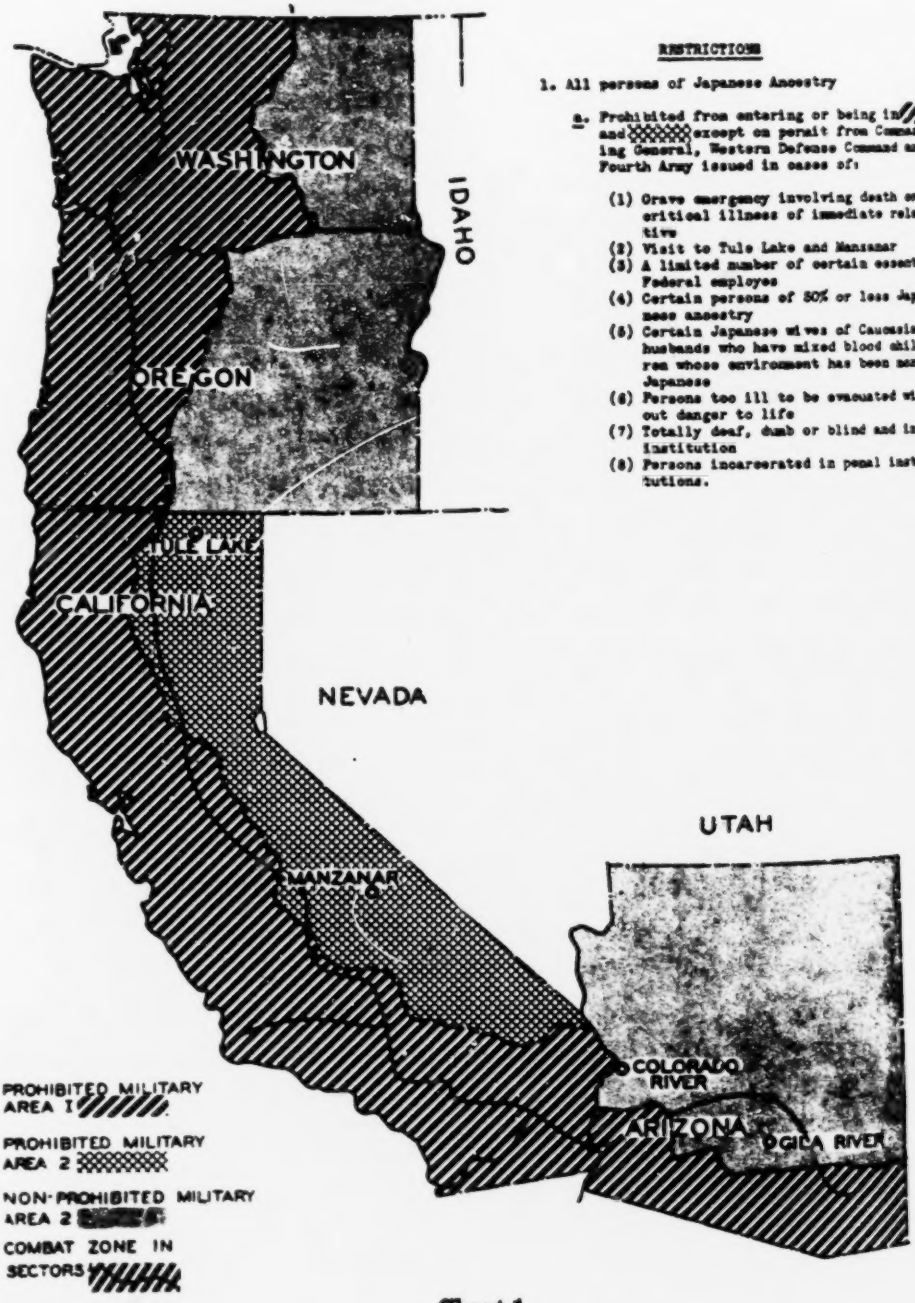
The instant case concerns the validity of the curfew and exclusion orders imposed upon persons of Japanese ancestry residing in Pacific Coast military areas,

by the Commanding General of the Western Defense Command. An appeal was taken to the Ninth Circuit Court of Appeals (No. 10,308) after judgment of conviction in the United States District Court for the Western District of Washington, Northern Division, upon an indictment charging appellant with having violated Public Law 503 (77th Cong., 2nd Sess., Ch. 191; 18 U.S.C. sec. 97A) by virtue of the disobedience of the curfew (Public Proclamation No. 3, 7 Fed. Reg. 2543, March 24, 1942) and evacuation (Civilian Exclusion Order No. 57, May 10, 1942) orders of Lieutenant General J. L. DeWitt, the Commanding General of the Western Defense Command and Fourth Army. The whole matter in controversy now comes before this Court for consideration by order (Tr. 43) made pursuant to Section 239 of the Judicial Code (28 U.S.C. sec. 346).

The defendant, an American citizen of Japanese ancestry, at the time of the said disobedience resided in the City of Seattle, State of Washington. The companion case of *Minoru Yasui v. United States,* No. 871, also before this Court, arises out of a judgment of conviction in the United States District Court for the District of Oregon upon an indictment for violation of Public Law 503 by reason of the disobedience of the said curfew order. Yasui, born at Hood River, Oregon, and a person of Japanese ancestry, resided at the time of the alleged violation in the City of Portland, State of Oregon. The full judicial history of these cases, together with the pertinent statutes, orders and proclamations, appears in the Government's briefs. Other American citizens, persons of

# MILITARY AREAS NOS 1 AND 2

## WESTERN DEFENSE COMMAND




**RESTRICTIONS**

1. All persons of Japanese Ancestry

   a. Prohibited from entering or being in [redacted] and [redacted] except on permit from Commanding General, Western Defense Command and Fourth Army issued in cases of:

   (1) Grave emergency involving death or critical illness of immediate relative
   (2) Visit to Tule Lake and Manzanar
   (3) A limited number of certain essential Federal employes
   (4) Certain persons of 50% or less Japanese ancestry
   (5) Certain Japanese wives of Caucasian husbands who have mixed blood children whose environment has been non-Japanese
   (6) Persons too ill to be evacuated without danger to life
   (7) Totally deaf, dumb or blind and in an institution
   (8) Persons incarcerated in penal institutions.

Chart 1.

Japanese ancestry residing in the State of California, have been convicted for violation of the curfew proclamation and similar exclusion orders.[1]

---

**THE INTEREST OF THE STATES OF CALIFORNIA, OREGON AND WASHINGTON.**

The States of California, Oregon and Washington face the prospect of the first onslaught upon continental United States by the Imperial Forces of Japan. These Pacific Coast States form the western portion of the Western Defense Command and contain within them Military Areas Nos. 1 and 2 as defined by the Commanding General of the Western Defense Command and Fourth Army. The westernmost boundaries of these States form a Combat Zone one hundred miles wide, extending from the Washington-Canadian border down the Oregon and California coasts and along the California-Mexican border (Chart 1, opposite). A field army occupies the length and breadth of these Pacific Coast States. Over one thousand miles of coastline must be guarded, not only against attack by sea, land and air but also against infiltration by enemy agents. Many strategic naval and army installations and establishments, aircraft factories, shipyards and other war plants, army

---

[1] *United States v. Korematsu*, No. 10,248, CCA-9, involves a person of Japanese ancestry residing at San Francisco, California, and raises questions identical with those in the instant and the *Yasui* cases. A question concerning the right of the defendant to take an appeal from the trial court's order therein (U.S.D.C. N.D., Cal., S.D., No. 27635-W) has been certified to this Court and accepted for decision.

training camps, posts and arsenals, vital defense resources and utilities are situated in these States.

Upon the declaration of war immediate action had to be taken for the further defense of the Pacific Coast and for the protection of national defense materials, premises and utilities.[2] 88.5 percent of the Japanese population of the country was concentrated in the States of California, Oregon and Washington.[3] An estimate made of the situation by the Commanding General of the Western Defense Command showed that the Pacific Coast was threatened with invasion by the forces of Japan; that there were over 112,000 persons of Japanese ancestry on the Pacific Coast living near prospective landing beaches and within the vicinity of defense plants, materials, utilities and military installations; that this group was largely unassimilated and that many within it possessed strong ethnic, religious, ideological and family ties with the enemy Japan; that both the time required to examine this large group and the lack of an adequate test and trained personnel made treatment upon an individual basis impossible in the face of the emergency which required prompt action. The preponderance of the problem on the Pacific Coast is illustrated by the accompanying map showing the Japanese population of the United States (Chart 2, opposite). The Commanding General therefore reached

---

[2]The mission of the Western Defense Command and Fourth Army is:

1. Defense of the Pacific Coast of the Western Defense Command against attack by sea, land and air;
2. Local protection of establishments and communications vital to the national defense for which adequate defense cannot be provided by local civilian authorities.

[3]1940 U. S. Census (16th).

GEOGRAPHIC DISTRIBUTION JAPANESE POPULATION

UNITED STATES: 1940

NUMBERS INDICATE JAPANESE POPULATION AS REPRESENTED BY ELEVATION OF STATE

Chart 2.

the decision that all persons of Japanese ancestry must be removed as a group from the military areas and that, prior to this being accomplished, all such persons were to observe certain curfew hours.

The States of California, Oregon and Washington believe that this problem within their States, from both a legal and practical viewpoint, should be treated solely as a military matter. The possibility that the exclusion orders might be held invalid and that persons of Japanese ancestry might be permitted to return before a time justified by the military situation is of the deepest concern to these States. The return of these people while the military necessity for their exclusion remains would require the police authorities of the Pacific Coast States to deal with the danger which the military authorities believe the presence of persons of Japanese ancestry presents to the defense of these States and the maintenance of internal security therein. To leave what is essentially a military problem to the civilian authorities for solution unfortunately would tend to confuse the present status of these people with the social and economic questions which have existed with reference to them in these States for many years. Their return against the advice of the military authorities undoubtedly would give rise, under the highly emotional conditions of war intensified by such incidents as the recent execution of captured American flyers, to an unreasoning public reaction. The prospect of public disturbances would be very real.

The cases now before this Court call for a statement of the occasions when military authorities in time of war and within a theater of operations may exercise control over persons, citizens and aliens alike, for the defense of the area against invasion, attack, sabotage, espionage and fifth column activities, and generally to further the prosecution of the war. For example, the Commanding General of the Western Defense Command has issued dim-out proclamations[4] for the purpose of reducing the amount of offshore lighting so that it cannot be used as an aid by enemy submarines in their attack upon coastwise shipping. These orders presumably supersede state lighting laws and are valid although they affect the use of property and restrict freedom of movement. Other measures may have to be undertaken, such as prohibiting public use of beach areas and requiring the evacuation of persons from areas subjected to nemy air attack. A clarification of the authority of the President and his subordinate military commanders to exercise such authority in time of war within a theater of operations, and the right of Congress to provide sanction for the enforcement of these military orders in the civil Courts, will assist local and state authorities in the performance of their duties in connection with the war effort.

Thus the interest of the States of California, Oregon and Washington in the specific and general questions raised here is clear.

---

[4]Proclamations Nos. 10 (August 5, 1942, 7 Fed. Reg. 6631) and 12 (October 10, 1942, 7 Fed. Reg. 8377)—control of lighting within restricted zones, Washington, Oregon and California.

## THE ESSENTIAL QUESTION.

In time of war, may a military commander in a military area within the United States exercise certain controls over civilians and civilian authorities for the purpose of defending the area against attack and threatened invasion or preventing sabotage, espionage or other acts endangering the prosecution of the War?

---

## THE ARGUMENT.

The facts bearing upon the military necessity for excluding all persons of Japanese ancestry from Pacific Coast military areas and imposing curfew are made a part of the argument, for once the factual background out of which these orders were made is understood the applicable legal principles will be self-evident.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), this Court said, in speaking of the scope of military authority over civilians in the United States:

> " * * * there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to take immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." (p. 399.)

Keeping this test in mind, it is believed that agreement can be reached that the military situation on the Pacific Coast with reference to the concentration and characteristics of the Japanese population presented a dangerous threat to the internal security of the area and the successful prosecution of the war and that the measures taken by the President and the Commanding General were conceived in good faith and were directly related to preventing the danger.

To judge the emergency which confronted the President and the necessity for the measures taken to meet it, consideration will have to be given to the military, political, social and psychological conditions on the Pacific Coast. In doing this the Court may take notice of many of the facts to be stated because they are generally notorious and are public events which are part of the history of the times[5] or are matters of public concern upon which the Court may inform itself by reference to documentary evidence or any other reliable source.[6]

---

[5] *Daniels v. Tearney*, 102 U.S. 415, 419;
*Clark v. U. S.*, 99 U.S. 493, 495;
*Wigmore*, Evd. (3d ed. 1940 sec. 2567a);
*Jones*, Evd. (2d ed. 1908 page 105).

[6] The courts will take judicial knowledge of matters of public concern although calculations and inquiries on the subject may be necessary. *Hoyt v. Russell*, 117 U.S. 401, 404.

In ascertaining matters of fact or of law to be judicially noticed, the court may resort to, or obtain information from, any source of knowledge which it feels would be helpful. *Greeson v. Imperial Irr. Dist.* (C.C.A.-9, 1932), 59 F. (2d) 529, 530.

The court may resort to any means it deems safe to refresh its memory. *Brown v. Piper*, 91 U.S. 37.

## I. THE MILITARY SITUATION ON THE PACIFIC COAST.

On the occasion of the treacherous attack by the Japanese upon Pearl Harbor on December 7, 1941, and upon the declaration of war on the following day (55 Stats. 795, 77th Cong., 2nd Sess., c. 561), the Pacific Coast was in danger of attack by land, sea and air. The bulk of our Pacific Fleet lay helpless at Pearl Harbor. The sudden onslaught, while the Japanese ambassadors were talking peace in Washington, found this country during the first months of the war unable to act offensively. The trained and prepared enemy rapidly added to its gains while this country hastily improved its defenses and began to dispatch the first of its forces. Because of the relatively light naval and air forces opposing the enemy in the Far East, there was an ever present danger that the Pacific Coast might be subjected to a major attack and possibly an invasion. The military measures taken to meet the possibility must be viewed in the light of the situation which then existed. On December 11, 1941, the Western Defense Command, combining the eight western States and the Territory of Alaska, was actuated by the War Department and designated as a "theater of operations".[7]

---

[7]Field Order No. 1, December 14, 1941.

1. The theater of war comprises those areas of land, sea and air which are, or may become, directly involved in the conduct of the war.

2. A theater of operations is an area of the theater of war necessary for military operation and the administration and supply incident to military operation. The War Department designated one or more theaters of operation.

3. A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting. (*Field Service Regulations—Operations, War Department, May 22, 1941.* Wartime Bulletin PM100-5.)

A combat zone was established by the Commanding General. (See Chart 1, opp. p. 3.) For the first seven months little occurred to reduce the fear of attack. On February 23, 1942, oil installations in the vicinity of Santa Barbara, California, were shelled by a Japanese submarine. On September 9, 1942, a submarine-based plane dropped incendiary bombs in the vicinity of Brookings (Mount Emily), Oregon. The radio station at Estevan, Vancouver Island, B.C., was shelled by a submarine at midnight on June 19, 1942. A few days later, an enemy submarine surfaced and shelled shore batteries at Astoria, Oregon. On June 3, 1942, Dutch Harbor, Alaska, was attacked by carrier-based planes. On June 7, 1942, the Japanese invaded continental North America by occupying the Islands of Attu and Kiska in the Aleutian group. There was an increasing indication that the enemy had knowledge of our patrols and naval dispositions, for ships leaving west coast ports were being intercepted and attacked regularly by enemy submarines.

This summary makes clear that during this perilous period the Pacific Coast was in danger of additional attacks and possibly invasion. As late as December, 1942, the Ninth Circuit Court of Appeals, referring to the attack on the Hawaiian Islands, declared, in *Zimmerman v. Walker,* 132 Fed. (2d) 442:

> "The courts judicially know that the whole Pacific Area of the United States has continued in a state of the gravest emergency; and that the imminent threat of a resumption of the invasion persisted." (p. 445.)

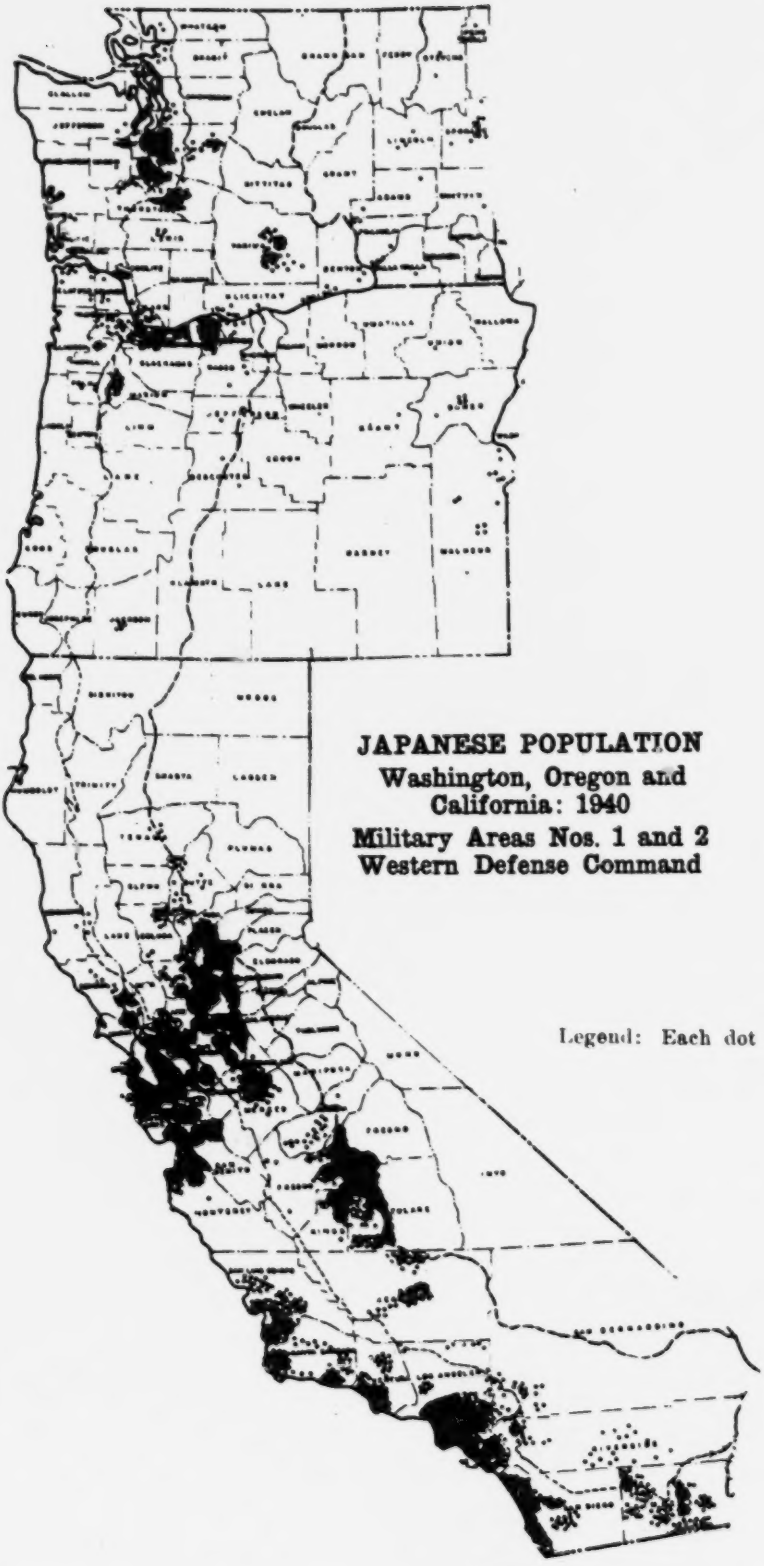

JAPANESE POPULATION
Washington, Oregon and
California: 1940
Military Areas Nos. 1 and 2
Western Defense Command
Legend: Each dot represents ten people

Chart 3.

And speaking with reference to the facts involved in the present case, it was said:

> "So far as concerns the imminence of danger of Japanese attack on the Pacific Coast, this court would be compelled to find that General DeWitt has a rational ground to expect it." (*United States v. Hirabayashi* (CCA-9), No. 10,308; Denman, C.J., dissenting from Certification of Questions to the Supreme Court, p. 13.)

The significance of the concentration and characteristics of the Japanese population within the States of the Pacific Coast must be appraised in the light of this military situation.

---

## II. THE CHARACTERISTICS OF THE JAPANESE POPULATION WITHIN PACIFIC COAST MILITARY AREAS.

Prior to their exclusion, 88.5 percent of all persons of Japanese ancestry in the United States resided in the Pacific Coast States: 93,717 in California, 14,565 in Washington, and 4071 in Oregon—nearly all living within the coastal area designated as Military Area No. 1. (Chart 3, opp.) The Japanese of the Pacific Coast area on the whole have remained a group apart and inscrutable to their neighbors. They represent an unassimilated, homogenous element[8] which in varying degrees is closely related through ties of race, language, religion, custom and ideology to the Japanese Empire.

---

[8] *Farrington v. Tokushige*, 11 Fed. (2d) 710 (CCA-9, 1926):

> "It is a matter of common knowledge that the Japanese do not readily assimilate with other races, and especially with the white race." (p. 714.)

It has been the policy of the Japanese Government to maintain these ties with the Japanese in this country.

**A. Japanese Nationalistic Organizations of the Pacific Coast.**

These activities were carried on through numerous Japanese organizations sponsored or receiving support from Japan.[9] Former Attorney General Earl Warren of California, and now Governor, stated before the Tolan Committee:[10]

> "An additional factor in the danger and one which would probably not be apparent to persons unfamiliar with the California Japanese lies in the fact that the Japanese in this State are very closely organized. There are a large number of Japanese organizations covering every branch of life. There are Japanese agricultural, commercial, educational, social, religious, and patriotic associations in every Japanese community. Almost every Japanese in the State is included in one or more of these organizations.
>
> * * * * * * *
>
> "However, the inter-relationship of the many Japanese associations and their control over the Japanese population of the State has been a matter of general knowledge and has been apparent from items appearing in the Japanese newspapers. These Japanese newspaper items also show that in the past years there has been a close

[9]An account of the work of these organizations appears in a book compiled and partly paid for by American Japanese. It was published in Japan in 1940, printed in Japanese, and entitled "Zaibei Nippon Zin Shi"—"History of the Japanese in America".

[10]Hearings and Reports of House Select Committee Investigating National Defense Migration on Problems of Evacuation of Enemy Aliens and others from Prohibited Military Zones, hereafter referred to as the Tolan Committee. (Part 29, San Francisco, p. 10974.)

relationship between Japanese associations in California and parent or governmental organizations in Japan and that on many occasions the associations in California have contributed to and assisted in the war effort of the Japanese Government.

"While we have no complete information as to the number of Japanese organizations existing in California, Japanese sources indicate that the number is large. Thus the public press carried an item from Tokyo April 25, 1941, to the effect that the Japanese 'Central Council of Overseas Organizations announced that there are 2,700 Japanese organizations in the United States, representatives of which will meet for a convention in Tokyo in November 1941.'

* * * * * * *

"That the Japanese associations as organizations have in the past supported and aided the military campaigns of the Japanese Government is beyond doubt. The contributions of these associations toward the Japanese war effort have been freely published in Japanese papers throughout California.[10a]

---

[10a] Some of these newspaper items are as follows:

"March 13, 1941.—Thirty-two bales of tinfoil were shipped to Japan through the Japanese consulate general and were contributed by Japanese associations of Fresno County, Kern County, Delano, and San Bernardino.

"July 6, 1941.—Central California Japanese Association announces the collection and transmission to the War Ministry of the sum of $3,542.05.

"March 6, 1938.—G. Yoshida, San Francisco Japanese Association, yesterday sent 400 pounds of tinfoil, making a record total of 2,800 pounds of tinfoil which he has collected, according to the records of the consul general's office."

The Japanese Veterans Association was similarly engaged:

"March 20, 1941.—It is announced that the War Veterans Associations in Japan, Germany, and Italy, in keeping with the spirit of the Axis Treaty, have formed joint and advisory com-

"At one time it is said the association [Japanese Veterans Association of America] numbered 8,000 members and at the meeting at which dissolution was decided upon some 300 representatives were present.

* * * * * * *

"This organization sponsored the tour of Maj. G. Tanaka, of the Japanese Army, and a member of the army general staff, who arrived in San Francisco January 1, 1941, with full uniform, sword, and medals and toured the State lecturing before various Japanese groups, eventually returning to Japan via New York. While here, he is reported to have said: 'Japan and the United States will go to war this autumn.' " (pp. 10,974-10,976.)[10b]

Over 124 separate Japanese organizations along the Pacific Coast were engaged, in varying degrees, in common pro-Japanese purposes, with local branches of these parent organizations numbering more than 310. There were 100 fascistic or militaristic organizations in Japan having some relation, either direct or indirect, with Japanese organizations or individuals in the United States. Many had branch organizations in the United States and directed the activities of these branches. A line of control existed from the Japanese Government.[11]

---

mittees to aid and establish the new world order. There are 3½ million veterans and reservists, headed by General Imei, who have pledged their cooperation to Axis aims."

"July 6, 1941. The Japanese Veterans Association of America, in its sixty-sixth meeting, reported the collection of $5,968.60, making a total of 829,440.34 yen collected and transmitted to Japan for use of the military services * * *"

[10b]See footnote 10 supra.

[11]The Court will take judicial notice of the Japanization program in the United States. (See *Akira Ono v. United States*, 267 Fed. 359, 362 (1920).)

The Hokubei Butoku Kai or Military Virtue Society of North America had headquarters in the town of Alvarado, California, and a branch office in Tokyo. Its purpose was to instill the Japanese code of Bushido among the Japanese throughout North America. Another militaristic organization was the Heimusha Kai, the purpose of which was furthering the Japanese war effort. Its prospectus read as follows:

"The world should realize that our military action in China is based upon the significant fact that we are forced to fight under realistic circumstances. As a matter of historical fact, whenever the Japanese government begins a military campaign, we, Japanese, must be united and everyone of us must do his part.

"As far as our patriotism is concerned, the world knows that we are superior to any other nation. However, as long as we are staying on foreign soil, what can we do for our mother country? All our courageous fighters are fighting at the front today, forgetting their parents, wives and children in their homes! It is beyond our imagination, the manner in which our imperial soldiers are sacrificing their lives at the front line, bomb after bomb, deaths after deaths! Whenever we read and hear this sad news, who can keep from crying in sympathy? Therefore, we, the Japanese in the United States, have been contributing a huge amount of money for war relief funds and numerous comforting bags for our imperial soldiers.

"Today, we, Japanese in the United States, who are not able to sacrifice our lives for our National cause are now firmly resolved to stand by to settle the present war as early as possible. 'We are

> proud to say that our daily happy life in America is dependent upon the protective power of Great Japan.' We are facing a critical emergency, and we will take strong action as planned. We do hope and beg you all to cooperate with us for our National Cause."[12]

A militant Japanese organization composed of Japanese ex-service men was known as the Kanjo Kai and was formed to support military action taken by the Japanese Government in the Orient. The following telegram from the Japanese Army Department was received by this group following upon the organization of the society, and was read at the first executive board meeting:

> "During this emergency, you officials are doing your utmost for the Country and the Army Department is very grateful. For the establishment of peace in the Orient, it is necessary for us to adopt positive steps in China."[13]

Monthly contributions of one dollar or more were made to the Imperial Japanese Army War Relief Fund.

The Japanese Association of America (Nipponjin Kai) was the principal liaison between the Japanese organizations in the United States and the Japanese

---

[12]*The New World Sun*, August 28, 1937, page 4, columns 6 and 10. (Japanese language newspaper published at San Francisco, California.)

[13]*New World Sun*, July 18, 1937, page 3, column 1.

Government. Maintaining close cooperation with the Consulate, it carried out the directives of that office.[14]

There were many other organizations which, by their names, indicate that their main purpose was the furthering and supporting of the nationalistic program of Japan.[15]

> "The significance of these integrated Japanese associations lies in the fact that through them it is possible for those at the head to exercise con-

---

[14]Article 3 of its by-laws provides:

"This association is organized by the local Japanese association under the jurisdiction of the Japanese consulate general of San Francisco." (Tolan Committee Hearings, Part 29, Warren, p. 10976.)

[15]The translation of the names of these organizations is indicative of their objects:

Kaigun Kyokai (Navy Association);
Aikoku Fujin Kai (Patriotic Women's Society);
Jugo Sekissei Kai (Behind the Gun Society or Red Heart Society);
Hokoku Kai (Society for Service to the Country);
Aikokuki Kenno Kisei Domei (Patriotic League for Contribution to the Airplane Fund);
Jugo Kai (Behind the Gun Society);
Ko-A-Sokushin Kai (Society for the Promotion of Asiatic Co-Prosperity);
Kokuryu Kai (Black Dragon Society);
Kibei Shimin Kai (Kibei Society);
Hokyoku Kai (Rising Sun Society);
Zaibei Nipponjin Kai (Japanese Association of America);
Zaibei Nipponjin Kai Renraku Nikkai Kanji Kai (United Councilors' Convention for Japanese Associations in North America);
Nanka Teikoku Gunjin Dan (Japanese Imperial Army Men's Corps of Southern California);
Jugo Haibutsu Riyodan (Behind the Gun Waste Utilication Society);
Josho Kai (Ever Victorious or Invincible Society);
Hinode Kai (Imperial Japanese Reservists);
Hokubei Zaigo Shokuin Dan (North American Reserve Officers' Association);
Sokoku Kai (Fatherland Society);
Suiko Kai (Los Angeles Reserve Officers' Association);
Zaibei Ikuei Kai (Society of Educating the Second Generation in America);

—Japanese Directory of Political and Religious Organizations.

trol over the conduct of other Japanese throughout the State. * * * With integrated organizations such as these exercising such complete control over the conduct of all Japanese in the State, it is quite evident that it would be extremely easy for those at the top to direct the Japanese throughout the State and wherever located in a widespread simultaneous campaign of sabotage which could carry the most serious consequences." (Tolan Committee Hearings, Part 29, Warren, p. 10980.)

**B. Indoctrination of American Japanese in Japan.**

For over twenty-five years children of alien Japanese have been sent to Japan by their parents for education.[16] Upon their return they were known as "Kibei". These young American Japanese were thoroughly indoctrinated with the Japanese nationalistic philosophy.[17] Of the Kibei in Hawaii, Andrew

---

[16]The Court will take judicial notice of this fact. See *Chun Kock Quon v. Proctor*, 92 F. .. (2d) 326, 330.

"Many of them returned to Japan with their family at a young age and returned to America in their late teens." Testimony of Henry Tani, Executive Secretary, Japanese-American Citizens League. (Tolan Committee Hearings, Part 29, p. 11150.)

[17]Joseph C. Grew, *Report from Tokyo*, Simon & Schuster, N.Y., 1942:

"In Japan the training of youth for war is not simply military training. It is shaping—a warping, if you will—of the mind of youth from the earliest years. Every Japanese school child on national holidays goes to his school and takes part in a ritual intended to impress on him his duties to the state and to the Emperor. Several times each year every child is taken with the rest of his schoolmates to a place where the spirits of dead soldiers are enshrined. The military aspect of the state is, and has been for many years, stressed above all other functions of government. Of the state's duty to the individual, or of the individual rights and liberties, the Japanese youth hears nothing. Of his obligation to serve the state, especially through military service, he hears every day." (p. 51.)

W. Lind, Professor of Sociology at the University of Hawaii, says:

> "Finally, there is the rather large Kibei group of the second generation who, although citizens of the United States by virtue of birth within the Territory, are frequently more fanatically Japanese in their disposition than their own parents. Many of these individuals have returned from Japan so recently as to be unable to speak the English language and some are unquestionably disappointed by the lack of appreciation manifested for their Japanese education."[18]

At one time it was estimated that there were about 50,000 American-born Japanese in Japan. The Kibei Shimin movement, sponsored by the Japanese Association of America, was organized to encourage their return to America. It appears that this campaign was successful in securing the return of a large number of American-born Japanese.[19]

---

[18]American Council Paper No. 5, page 187, American Council, Institute of Pacific Relations, 129 East 52nd Street, New York.

[19]Tolan Committee Hearings, Part 29, Warren, p. 10978. The Hawaiian (Honolulu) Sentinel, Jan. 27, 1938, reported the special representative of this movement, Shiro Fukicka, General Secretary of the Los Angeles Japanese Chamber of Commerce, as saying:

> "There are roughly about 20,000 American-born youths between the ages of 18 and 25 residing now in Japan. Being high school graduates, they are well versed with the conditions and things of Japanese and would make ideal immigrants to North America." (*Un-American Activities in California*, Report of Joint Fact-Finding Committee on Un-American Activities in California to California Legislature, 1943.)

During 1941 alone, 1573 Kibei entered west coast ports from Japan, and 1147 Issei, or alien Japanese, reentered the United States from Japan. The 557 male Japanese less than twenty-five

Speaking of the American-born Japanese educated in Japan, Governor Earl Warren, then Attorney General of California, after a survey by the law enforcement officers of the State, said in his testimony before the Tolan Committee:

> "I want to say that the consensus of opinion among the law-enforcement officers of this State is that there is more potential danger among the group of Japanese who are born in this country than from the alien Japanese who were born in Japan. * * * There has been practically no migration to this country since 1924. But in some instances the children of those people have been sent to Japan for their education, either in whole or in part, and while they are over there they are indoctrinated with the idea of Japanese imperialism. They receive their religious instruction which ties up their religion with their Emperor, and they come back here imbued with the ideas and the policies of Imperial Japan."[20]

**C. Significance of the Issei.**

Approximately two-thirds of the persons of Japanese ancestry residing in the Pacific Coast States are native born citizens (Nisei) and one-third are aliens (Issei) ineligible for citizenship.[20a] (*Ozawa v. United*

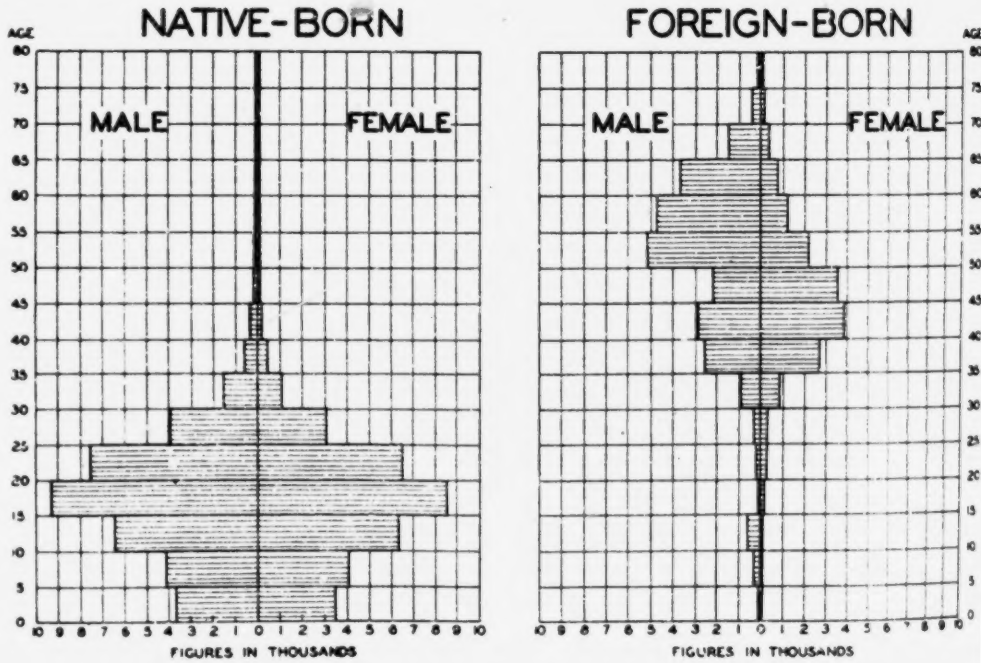
---

years of age who entered west coast ports from Japan during 1941 had an average age of 18.2 years and had spent an average of 5.2 years in Japan. Of these, 239 had spent more than three years there. This latter group had spent an average of 10.2 years in Japan. Of the returning Japanese, more than 50% had a close relative in Japan.—Derived from Ships' Manifests filed at the San Francisco, Seattle and Los Angeles Port Offices of the Federal Immigration and Naturalization Service, Department of Justice.

[20]Tolan Committee hearings, Part 29, San Francisco, p. 11014.

[20a]1940 Census of the United States (16th), Population, 2nd Series (Department of Commerce, pp. 50, 52, 61).

# AGE AND SEX COMPOSITION OF THE PACIFIC COAST JAPANESE POPULATION: 1940




@ -- FOR THE STATES OF WASHINGTON, OREGON, CALIFORNIA, AND ARIZONA.
SOURCE: UNITED STATES BUREAU OF THE CENSUS.

Chart 4.

*States,* 260 U. S. 178 (1922).) However, in considering this fact for the purpose of evaluating the reasonableness of the group evacuation, these figures do not present the true significance of the relationship of the Japanese aliens to American-born Japanese.

Because of the late date of Japanese entrance into this country and the exclusion of Japanese immigration in 1924,[20b] the foreign-born Japanese represent the bulk of the adult Japanase population on the Pacific Coast. This situation is graphically presented in Chart No. 4, opposite. Thus it appears that the foreign-born Japanese are almost entirely enemy aliens and that the citizens of the group are peculiarly subject to their influence. The median age of the native born is 17½ years, while that of the foreign-born is 50 years. 90% of the 71,484 native-born Japanese in the Pacific Coast States are under the age of 28 years. 49,186 are under the age of 21 years.[20c] This breakdown of the age groups shows that the evacuation in most cases had to be accomplished with refer-

---

[20b]Immigration Law of 1924, 8 U.S.C. 213. The feeling of separateness and implied racial inferiority engendered by this Act was one of the factors to be judicially noted in deciding the instant case, according to Denman, C. J.:

> "These facts are entitled to be considered with reference to the likelihood of disaffection among a class so treated, in determining General DeWitt's regulations for exclusion of dangerous people from the war areas bordering the Pacific. • • • Neither General DeWitt nor this court is concerned with the political or social justification of this stigma on the Mongolian, but both are concerned with its effect on proud spirited people so branded by the Congress."
> —Upon Certification of Questions to this Court, *United States v. Hirabayashi* (CCA-9, No. 10,308), p. 28.

[20c]Unpublished information furnished by Census Bureau of United States.

ence to family groups rather than upon an individual basis.

The enforced alienage of the Issei has caused them to retain a close relationship with the Japanese Government through the consulates. Because of their mature years and their control of the wealth of the Japanese communities, they control Japanese business establishments and agricultural groups[20d] and dominate the many Japanese organizations (supra, p. 12).[20e] The parent-child relationship which exists between the Japanese aliens and the native born is particularly significant because great importance is given to filial obligations in Japanese family life.[20f]

**D. Japanese Language Schools.**

An additional pro-Japanese influence among American-born Japanese were the Japanese language schools on the Pacific Coast. To assist in the Japanization of the second generation, the Zaibei Ikeui Kai (So-

---

[20d]Tolan Committee Preliminary Report, p. 302.

[20e]Statement of Togo Tanaka, Editor of English Section of Rafu Shimpo, Japanese daily newspaper published in Los Angeles, California.—Report of California Legislative Committee on Un-American Activities in California, 1943. Mr. Tanaka stated that: "The older generation, or pro-Japanese group, influenced the thinking of the younger Nissei generation on the matter of the Sino-Japanese war. This accounted for the Nissei's activity in propagandizing the Japanese cause against China. The Issei influence was very strong in this connection. The Nissei had been taught that the Japanese were embarking on a great military crusade in China and building a new order in the Far East." Tanaka believed that the Nissei had been drawn into this ideological position because of emotional ties and that the younger generation of American-born Japanese found it impossible to become objective in face of their parents' prejudice.—Report, pp. 333-334.

[20f]The Court will take judicial notice of social and economic conditions. *Edwards v. California*, 314 U. S. 160, 173 (1941).

ciety for Education of the Second Generation in America) was organized in April, 1940, less than two years before the attack on Pearl Harbor. The purposes of this organization were stated as follows:

> "With the grace of the Emperor, the Zaibei Ikeui Kai is being organized in commemoration of the 2,600th Anniversary of the Founding of the Japanese Empire to Japanize the second and third generations in this country for the accomplishment of establishing a greater Asia in the future * * *."[21]

In California alone there were 248 of these schools, with a total student body of 17,800 and an aggregate faculty of 454.[22] Apparently the text books used were edited by the Department of Education of the Japanese Imperial Government.

The purpose of *The Buddhist Japanese Language School* is to teach not only the Japanese language, *but also to indoctrinate Japanese spirit* as well as Buddhism. This school was founded April 19, 1903. There were about 35 Buddhist language schools and 4900 pupils. Some of the graduates of these language schools were selected to go to Japan and study Japanese education.[22a]

The *Hokubei Butoku Kai* (*Military Virtue Society in North America*) was founded on September 27, 1929. Since that time, this Society has spread all

---

[21]*New World Sun*, April 13, 1940, page 4, column 1.

[22]Zaibei Nippon Zin Shi, *History of the Japanese in America*, Pt. II, Ch. 6, p. 483. (Published in Tokyo in Japanese, 1940. Translation.)

[22a]Ibid., Part II, Chap. 5, p. 422.

over the West Coast. In 1940, it had 41 branches and more than 10,000 members. Since 1932, this Society has opened summer schools for military virtue and organized second generation Mother Country Militia Training Corps. This Corps selected 14 members and sent them to Japan for their education. Since then, every year Mother Country Visiting Militia Training Corps have been sent to Japan and in an endeavor to absorb Japanese culture.[22b]

**E. Dual Citizenship.**

The theory of the Japanese Government that persons of Japanese ancestry, although born in America, may also possess Japanese citizenship has been a barrier to the Americanization of the Japanese.[23] As pointed out in the Report of the Tolan Committee:

> "Two barriers to Americanization of the Japanese have long existed: First, the E lusion Act by which the alien parents were denied citizenship; and second, the dual citizenship of Japanese born in the United States or its Territories and possessions. The former barrier has thrown the alien back upon the Japanese Government, through the operations of the consulates. *This relationship has been reenforced by the presence*

[22b]Ibid., Part II, Chap. 8, p. 564.

[23]It is estimated that 32 per cent of the Nisei—second generation—born in America hold Japanese citizenship, but this figure includes those who are not certain if they have this status. Statement by executive secretary, S. F. chapter of Japanese-American Citizen League, Tolan Committee Hearings, p. 11151.

Act XX-2 of the Japanese Nationality Law of 1924 requires a declaration of intention to retain Japanese nationality for persons born after 1924. A person born prior to 1924 may relinquish Japanese nationality. See Imperial Ord. No. 261, Act III and Ord. No. 262.

*on the west coast of large numbers of mercantile establishments and banks tying the commercial groups in the Japanese-American community to Japan. This in turn has led to the practice of sending children to Japan to be educated in preparation for trade and banking.* Thus, the leadership of the business community has fallen to those in close touch with the homeland and to their children whose education and commercial position has directed them toward the maintenance of dual citizenship. Communities of Japanese farmers have been more free of these influences, but the need to secure financing of their crops has combined with strong peasant ties of language and kinship to keep these rural people in touch with Japan."[24] *

**F. Emperor Worship—Shintoism.**

The fact that a number of American citizens of Japanese ancestry participate in the worship of the Emperor of Japan must also be considered in judging loyalties. This worship, known as the cult of Shinto, looks upon the Emperor of Japan and his ancestors as deities and thus joins, in one, political and religious loyalty. The aims and purposes of the State of Japan become the faith of the adherents of Shinto.[25] While there is an indication that Shintoism is not so widely practiced among second generation American Japanese as among their alien parents, the younger generation participate in the rites of Em-

[24]Preliminary Report and Recommendations. These recommendations were approved in the Final Report of the Committee (H.R. No. 2124, 77th Cong., 2nd Sess., May 1942, p. 11).

*Except as hereinafter indicated, emphasis is added.

[25]D. C. Holton, The National Faith of Japan (1938).

peror worship as an expression of national spirit and racial solidarity.[26]

**G. The Prospect of a Fifth Column.**

The facts just reviewed indicate that because of the racial, cultural, religious and ideological ties and sympathies with Japan and the various causes which have kept the Japanese apart, there would be a sufficient number that could be used as a fifth column in assisting in sabotage or espionage or giving aid in the event of an attempted attack.[26a] Recent history shows that the Japanese made use of military information gathered by Japanese living in the Hawaiian

---

[26]For example, on February 11, 1940, the Japanese Association of Sacramento sponsored an Emperor worshipping ceremony in commemoration of the 2600th anniversary of the founding of Japan. 3000 attended.

Another group met on January 1, 1941, at Lindsay, California, to honor the 2601st year of the founding of the Japanese Empire, participated in the annual reverence to the Emperor, and bowed their heads toward Japan in order to indicate that they would be "• • • ready to respond to the call of the mother country with one mind. Japan is fighting to carry out our program of Greater Asiatic co-prosperity. Our fellow Japanese countrymen must be of one spirit and should endeavor to unite our Japanese societies in this country • • •." The program was as follows:

a. Singing of Japanese National Anthem.
b. Opening of the Emperor's portrait.
c. Reading of the Emperor's Rescript.
d. Reading of Message of Reverence.
e. Bowing heads toward Japan.
f. Shouting "Banzai" (Long Live the Emperor).

(*New World Sun*, January 7, 1941, page 5, column 6.)

[26a]The fact that the Hawaiian Islands "because of their position and the inclusion in their population of so large an element presumptively alien in sympathy are peculiarly exposed to fifth column activities" was judicially noticed in *Zimmerman v. Walker*, 132 Fed. (2d) 442, 446 (1943).

Islands,[27] Malaya, the Philippines, Burma and the Netherlands East Indies.

That the Japanese on the Pacific Coast, citizen and alien, are recognized by the Japanese Government as potential agents to assist the Japanese army, navy and air force is revealed in the unabridged translation of the book "The Three Power Alliance and a United States-Japanese War",[28] published in 1940 in Tokyo by Kinoaki Matsuo, an officer in the Japanese Naval Intelligence. Speaking of the expected use to be made of Japanese in aid of an invasion of Southern California, Matsuo says:

> "The climate being ideal, San Pedro is an exceptionally good harbor; there are many Japanese subjects in that area engaged in fishery." (p. 143.)

And of the Japanese in Hawaii, he writes:

> "* * * If a false step is made it might give rise to a regrettable incident such as a great massacre * * * but they will be of great help when a landing is made by our army. * * *" (p. 296.)

---

[27]Report of the Commission appointed by the President of the United States to investigate and report the facts relating to the attack made by Japanese armed forces upon Pearl Harbor. Justice Robert's Report, pages 12-13, Sen. Doc. No. 159; 77th Cong. 2nd Sess.

The use of the fifth column technique in modern warfare may be judicially noticed. (*Ex parte Liebmann* (1916), 1 K.B. 268, 274-5, 278.)

[28]*The Three Power Alliance and a United States-Japanese War*, Kinoaki Matsuo (1940); translation by Kilsoo K. Haan, *How Japan Plans to Win*, Little-Brown & Co., Boston (1942).

**H. Danger of Sabotage.**

Within the Pacific Coast areas in which persons of Japanese ancestry were concentrated there are numerous military and naval establishments as well as public utilities, shipyards, airplane factories and thousands of other industries essential to the war effort. One-third of the nation's war planes and one-fourth of the country's ships are being built on the Pacific Coast. These and other important factories are located in the Puget Sound Area of Washington and in the vicinity of the metropolitan areas of Portland, Oregon, and San Francisco, Los Angeles and San Diego, California.[29] From these ports men and materials move to the broad Pacific battle areas. Seattle is the principal port in the northwest from which troops and materials to Alaska are supplied. Within this metropolitan area are located the vital aircraft and shipbuilding plants of the northwest—the Bremerton Navy yard, the Boeing aircraft factories, and some of the most vital shipbuilding ways of the nation. Within this same area was concentrated most of the Japanese of the northwest, as depicted by Chart 7, App. page ii.

The San Francisco area is one of the great ports for the Pacific Coast. It is invaluable to the Army and Navy. The Mare Island Navy Yard, the Hunter's

---

[29]A reference to the spot map (Chart 3, opp. p. 11), showing the disposition of the Japanese population, pictures the high concentration of persons of Japanese ancestry in the Pacific Coast area.

"This court can take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast." (*Ex parte Kanai*, 46 Fed. Supp. 286, 288 (D.C., E.D., Wisc., July 29, 1942.)

Point docks, the San Francisco and Golden Gate bridges, the Kaiser and Marinship and numerous other shipyards, the Permanente magnesium mill are but a few of the important plants. Chart No. 8, App. iii presents the picture of the concentration of Japanese in this area.

Metropolitan Los Angeles is one of the greatest aircraft centers of the world including the great Douglas, Lockheed, Vega, and Bendix factories. Other defense plants number into the many hundreds. There should be superimposed on this scene the picture presented by Chart 9, App. page iv, showing the concentration of Japanese in the Los Angeles Metropolitan Area. This shows that Terminal Island, with the nearby Navy shipyards, air fields and harbor facilities, was occupied almost exclusively by Japanese. (Chart 9, App. page iv.)[30]

Of scarcely secondary importance is the protection of the lumber industry of Washington, Oregon and California. The large area devoted to this industry afforded saboteurs unlimited freedom of action. The

---

[30]Part 29, San Francisco Hearings Tolan Committee. Included in Exhibit B, p. 10988, is a letter dated February 19, 1942, from C. B. Horrall, Chief of Police of Los Angeles, to the Attorney General of California, in which it is stated:

> "It is my opinion that the danger, especially for fifth-column activities in this district, is serious. This is due to the fact that there are some twenty-five to thirty thousand Japanese in this area and the location of a large portion of these are in very strategic areas. These strategic areas are in the very close proximity of the coastal regions where an invasion party would necessarily be landed. I have no doubt that they would lend any and all assistance possible to a Japanese land invasion, and several of the Japanese who are believed to be as patriotic as any, have expressed the above opinion in interviews." (p. 10989.)

danger from forest fires involved not only the destruction of valuable timber but also threatened cities, towns and other installations in the affected area. Mr. Smith Troy, Attorney General of the State of Washington in his statement to the Tolan Committee declared that the protection of the lumber resources of the State presented tremendous difficulties in view of the possibility of sabotage, and that lumber was a vitally important defense material needed in the construction of ships and camps.[30a] The entire coastal strip from Cape Flattery south to Lower California is particularly important from a protective viewpoint. There are numerous naval installations and the coastline is particularly vulnerable. Distances between inhabited areas are great and enemy activities might be carried on without interference.[31]

The Attorney General of the State of California, with the assistance of the law enforcement authorities of the State, examined the location of persons of Japanese ancestry with reference to strategic military installations and defense premises. His report concluded:

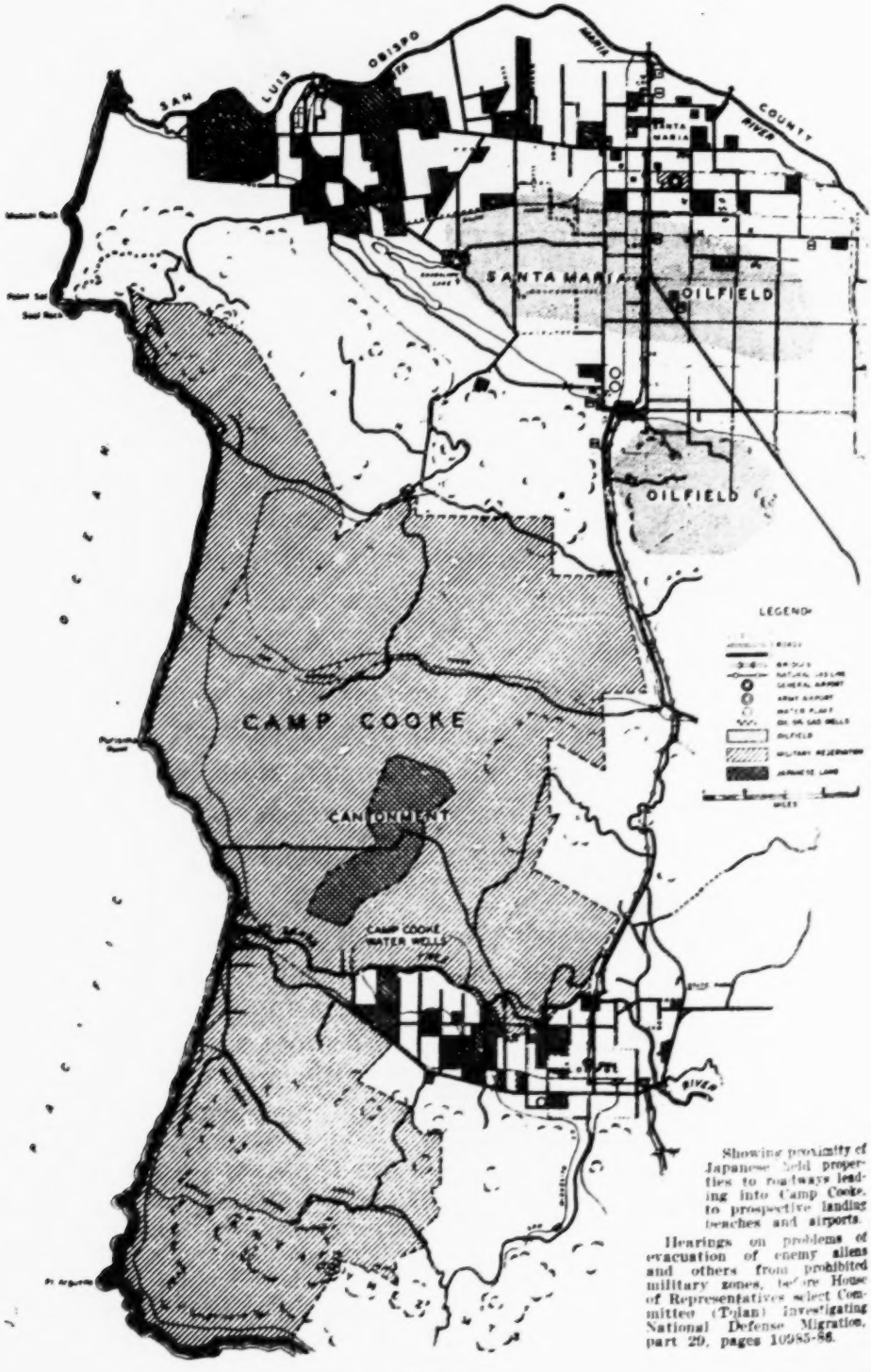
> "It shows that along the coast from Marin County to the Mexican border virtually every important strategic location and installation has one or more Japanese in its immediate vicinity. The same situation exists in those counties of the Sacramento and San Joaquin Valleys that have

---

[30a] *Tolan Committee Hearings*, Part 30, p. 11501.

[31] The possibility of infiltration by enemy agents was forcefully brought to this Court's attention in the facts which it studied in connection with the landing of German saboteurs on the Long Island and Florida Coasts. (*Ex parte Quirin*, U.S. Sup. Ct. Oct. 29, 1942; 87 L.Ed. 1.)

## COAST OUTLINE OF SANTA BARBARA COUNTY




Showing proximity of Japanese held properties to roadways leading into Camp Cooke, to prospective landing beaches and airports.

Hearings on problems of evacuation of enemy aliens and others from prohibited military zones, before House of Representatives select Committee (Tolan) investigating National Defense Migration, part 29, pages 10985-86.

**Chart 5.**

## Santa Barbara County

The beach at the north end of the county, upon which Japanese are living, is entirely open to landing.

In the city of Santa Maria, Japanese-owned land is adjacent to the principal San Francisco-Los Angeles telephone lines, power lines, water works and Pacific Coast highway.

Japanese lands near Lompoc cover the only entrance to Camp Cook. Because of the nature of the terrain, the Japanese could block the entrance to this military reservation.

The Santa Ynez Valley, equally as fertile as the Santa Maria Valley, but containing no strategic points, has no Japanese living within it.

The Santa Maria, El Capitan, Goleta and Summerland oil fields are surrounded by or adjacent to Japanese occupied lands. Such lands are also in close proximity to the Santa Barbara airport, gas storage plants, gas lines, main railroad line, main highway and a radio broadcasting station (shelled by Japanese submarine).

Near Santa Barbara, the United States lighthouse is completely surrounded by Japanese-occupied lands.

Thus if the Japanese located on the aforementioned lands acted in unison, they could destroy railroad and highway communications, telephone connections, gas plants, four oil fields, a light house and a radio station. They could assist an enemy landing on the coast.

(For further details see Tolan Committee Hearings, Part 29, pp. 10985-10986.)

any considerable Japanese population, and in San Bernardino, Riverside, and Imperial Counties."[32]

An illustration is presented in the accompanying Chart 5, opposite, together with the excerpt from the report of the District Attorney of Santa Barbara County, showing the situation in his county.

In the San Diego area a number of our most important aircraft manufacturing plants are located as well as Army and Navy installations and public utilities needed for their operations. The accompanying Chart 6, opposite page 32, of San Diego County shows some of the particular points where Japanese were immediately adjacent to these important installations.

**I. Internal Security Threatened by Anti-Japanese Disturbances.**

Because of the growing bitterness of war, together with the basis for suspicion due to the characteristics of the Japanese population on the Pacific Coast, just reviewed, it was reasonable for the Commanding General to anticipate that the continued presence of Japanese in Pacific Coast military areas would present a constant threat of anti-Japanese disturbances. This would endanger the internal security of the area. Therefore it was necessary, in order to preserve internal security as well as to protect the Japanese themselves, to remove them from Pacific Coast military zones.[33]

---

[32]Statement by Hon. Earl Warren, Attorney General of the State of California, before Tolan Committee. (Part 29, San Francisco Hearings.)

[33]"Even from the small areas that they have left up to the present time there are many, many Japanese who are now roaming around the State and roaming around the Western States in a

Based upon his contact with the prosecuting attorneys of the State of Washington, the State Attorney General, the Honorable Smith Troy, related to the Tolan Committee that:

> "During the past several weeks, there has been a growing concern among all prosecutors about the possibility of mob violence against both citizens and alien Japanese which might flare up as a result of severe war casualties or other inflaming incidents of the war."[33a]

Thus it is seen that there was a real and present danger of attack or invasion and that among the 112,000 persons of Japanese ancestry within the Pacific Coast States there was reason to believe that there were a considerable number of American-Japanese who were potentially disloyal and, because of their location, were capable of conducting espionage for the enemy and committing sabotage to war plants and utilities in a way which might have had disastrous consequences for the Pacific Coast and have seriously interfered with America's success in its war with Japan. We now consider the action which was taken to meet this military problem.

---

### III. THE ACTION TAKEN.

To meet the pressing and serious situation on the Pacific Coast and to authorize action with reference to other persons whose presence was deemed dangerous to the defense of military areas, President Roose-

---

condition that will unquestionably bring about race riots and prejudice and hysteria and excesses of all kind." (Tolan Committee Hearings, Warren, Part 29, p. 11015.)

[33a]Tolan Committee Hearings, Seattle Pt. 30, p. 11503.

# COAST OUTLINE OF SAN DIEGO COUNTY

Showing location of Japanese operated farms and Japanese households and relation to aircraft factories, power lines, Army and Navy establishments, ports of embarkation and important highways and prospective landing beaches.

Hearings on problems of evacuation of enemy aliens and others from prohibited zones before Select House of Representatives Committee (Tolan) Investigating National Defense Migration, page 10984.

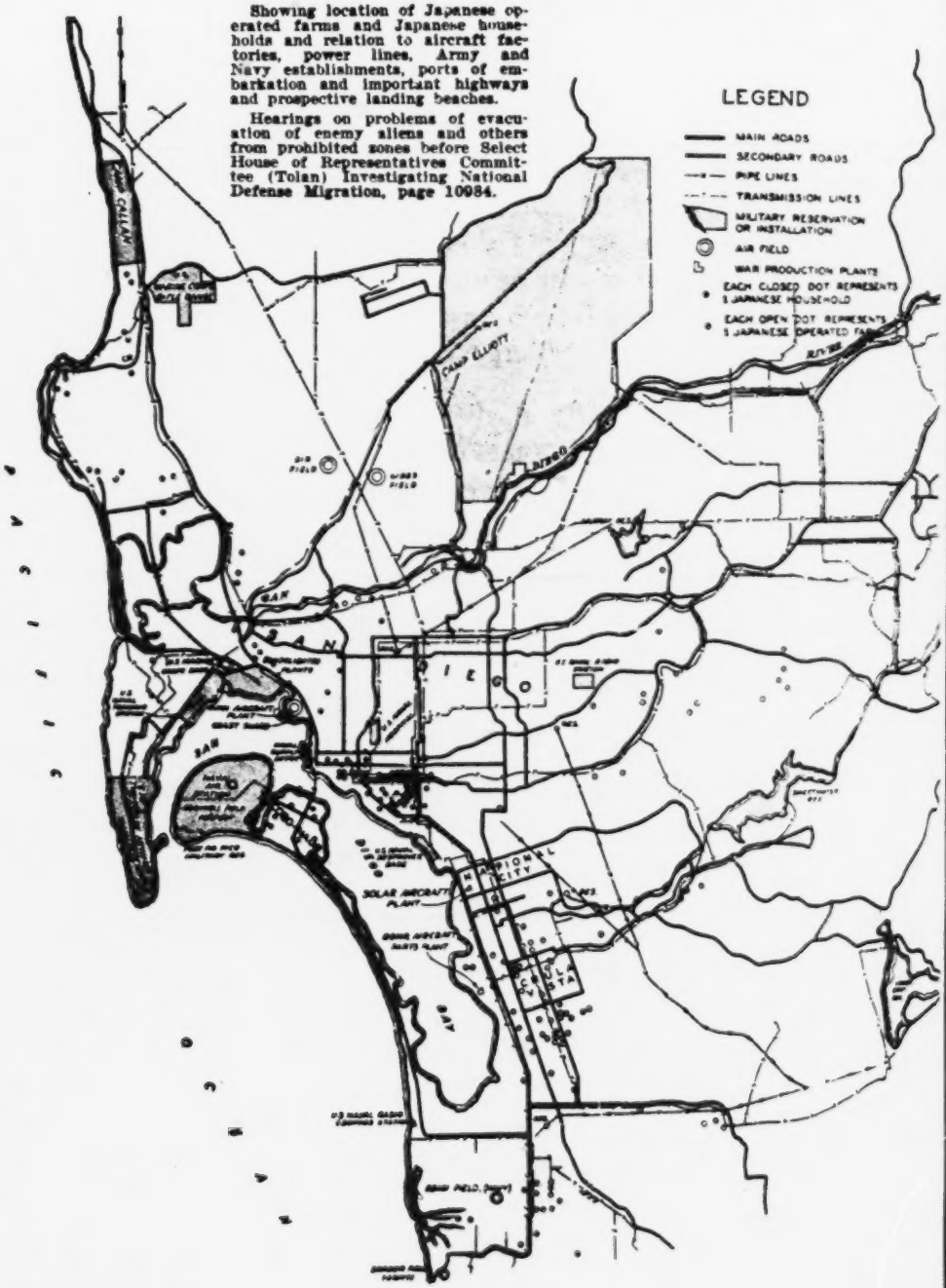



Chart 6.

## San Diego County

Thirty miles of open coast containing main railroad and highway. Japanese live throughout this area.

Japanese are located at following strategic points:

Near naval ammunition depot, Marine Corps base, naval training station, Fort Rosecrans military reservation, destroyer base, naval supply depot and Coast Guard depot.

Adjacent to water wells, pumps, lines and dams supplying water to military reservations and the county.

Adjacent to Camp Callan and power lines supplying the Camp and San Diego.

In the vicinity of Solar Aircraft, Rohr Aircraft, Ryan Airplane and three Consolidated Aircraft plants.

Adjacent to Navy Airport at Ream Field, Army Airport at Border Field and San Diego Municipal Airport.

(For further details see Tolan Committee Hearings, Part 29, pp. 10984-10985.)

velt on February 19, 1942, as Commander-in-Chief of the Army and Navy, issued Executive Order 9066 (U.S.C. Cong. Ser. No. 2, p. 157 (1942)), authorizing and directing the Secretary of War or the military commanders designated by the Secretary, to prescribe military areas whenever it was deemed necessary, from which all persons might be excluded and, within the discretion of either of such officers, to impose restrictions with respect to the right of any person to enter, remain in or leave such military areas. The President's order was based on the ground that the successful prosecution of the war required every possible protection against espionage and sabotage to national defense material, national defense premises and national defense utilities. The next day the Secretary of War designated Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, as the military commander to carry out the terms of Executive Order 9066 in the Western Defense Command.[34]

On March 2, 1942, General DeWitt by Proclamation No. 1 (March 2, 1942, 7 Fed. Reg. 2320) declared that as the Western Defense Command was a theater of operations and because the Pacific Coast was particularly subject to attack, to an attempted invasion, and in connection therewith to sabotage and espionage, it was necessary to adopt military measures to safeguard against such operations. Therefore, pursuant to the power granted by President Roosevelt in Executive Order 9066 and by authorization of the Secretary of War, Military Areas Nos. 1 and 2 (Chart 1, opposite

[34]Letter from Secretary of War to Lieutenant General J. L. DeWitt, February 20, 1942.

p. 3) were established as a matter of military necessity. Military Area No. 1, as then defined, included approximately the western half of Washington, Oregon and California and the southern half of Arizona[35] and still coincides approximately with the Army's Pacific Combat Zone. The proclamation then stated that such persons or classes of persons as the situation required would be excluded from all of Military Area No. 1 and from certain zones in Area No. 2. By Proclamation No. 2 (March 16, 1942, 7 Fed. Reg. 2405) other prohibited zones within Area No. 2 were established under similar conditions. See Chart 1, opposite page 3.

The War Relocation Authority was established on March 18, 1942, by Presidential Executive Order 9102[36] "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security". The Authority was authorized to formulate and effect a program for the removal from the areas of persons designated under Executive Order 9066 and to provide "for their relocation, maintenance, and supervision".

With Proclamations 1 and 2 and Executive Order 9066 before it, Congress, in order to provide for enforcement in the Federal Criminal Courts of the orders issued under the Executive Order, on March 21, 1942, enacted Public Law 503 (77th Cong., 2nd Sess., Ch. 191). This Act declared it to be a misdemeanor for anyone to enter, remain in or leave or commit

---

[35]Because the military situation no longer required it, the area in the State of Arizona prohibited to persons of Japanese ancestry by Proclamation No. 1 has been reduced. (Proclamation No. 16, March 17, 1943, 8 Fed. Reg. 3256.)

[36]U.S.C. Cong. Ser. No. 3, p. 265 (1942).

any act in any prescribed military area or zone contrary to the order of the Secretary of War or any designated military commander, provided such person knew or should have known of the restrictions or orders and that his act was in violation thereof.[37]

By Proclamation No. 3 (March 24, 1942, 7 Fed. Reg. 2543), curfew hours were established for all persons of Japanese ancestry, and all alien enemies in Military Area No. 1 and certain zones in Military Area No. 2. This is the order which appellant was found to have violated under Count II of the indictment. (Tr. 2-3.)

By Public Proclamation No. 4 (March 27, 1942, 7 Fed. Reg. 2601), General DeWitt prohibited enemy aliens and all persons of Japanese ancestry from leaving Military Area No. 1 after March 29, 1942, until further notice. Thereafter a series of Civilian Exclusion Orders were issued by which all persons of Japanese ancestry, both alien and non-alien except in special cases, were excluded from all portions of Military Area No. 1 and certain portions of Military Area No. 2.

The appellant, residing within Military Area No. 1, was ordered excluded under Civilian Exclusion Order No. 57, dated May 10, 1942. (Tr. 1-2.)

On June 8, 1942, Proclamation No. 7 (7 Fed. Reg. 3062), referring to the Civilian Exclusion Orders by which all persons of Japanese ancestry were excluded

---

[37] "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That whoever shall enter, remain in, leave or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of

from portions of Military Area No. 1, declared that Lieutenant General J. L. DeWitt, pursuant to the authority vested in him by the President of the United States and by the Secretary of War and under his powers as Commanding General, ratified the Civilian Exclusion Orders and excluded all persons of Japanese ancestry from all portions of Military Area No. 1.

**A. The curfew and exclusion orders, applied on a group basis within the military areas, were conceived in good faith in the face of emergency and were directly related to the mission of the Commanding General in defending the Pacific Coast and preventing sabotage and espionage.**

The need for action being clear, and the authority to exclude persons from military areas having been granted, the remaining consideration concerns the propriety of excluding all persons of Japanese ancestry as a group from the military area and imposing curfew as an incident thereto. In judging the reasonableness of dealing with the problem upon a group basis, the three Pacific Coast States appearing here as *amici curiae* believe that it is of the utmost importance for the members of the Court to judge the good faith and validity of the Commanding General's action in the light of the facts as they existed on the Pacific

---

the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense." (77th Cong., 2nd Sess., Ch. 191.)

Coast when the curfew and evacuation orders were issued in March and in May, 1942—a period when the Japanese were at the height of their military fortunes. (*Mitchell v. Harmony,* 13 How. 115 (1851).) In passing upon the group exclusion, judgment should not be based on conditions as they now exist a year after the exclusions were ordered and when the dangers have somewhat subsided, although the possibility of raids remains and precautions against sabotage and espionage must be maintained until the war is over.

It is clear that the exclusion was considered entirely as a matter of military necessity and that no foundation exists for any claim that the action of the President or Commanding General was the result of a public clamor born of old prejudices.[38]

If it cannot be said that group exclusion was not an unreasonable method with which to meet the emer-

---

[38] "What arguments were presented to the President by the military authorities of this district have not been made known, but to assume that General DeWitt, the Federal Bureau of Investigation, the Army and Naval Intelligence were motivated by race prejudice, greed for land, or popular hysteria, as this letter calmly does, is just silly. And, it was the arguments of this group that plainly impressed the President.

"One has but to recall the original objections of the administration, as voiced by Attorney General Biddle, to removal of the Japs, to realize that it was not popular clamor that influenced the President, but very cogent evidence submitted by the military command. The implication that the President would be swayed by race prejudice, greed, or hysteria is no compliment. His instincts are in the other direction. * * * The exclusion was a military measure and was recognized as such, and as necessary, by the Japanese themselves, who submitted to it * * *. These Japanese knew that there were traitors to the United States in their midst and further that complete identification of all of them was impossibly difficult."—An editorial on the proposal of the Post-War Council's plea to President Roosevelt to revoke evacuation order—Los Angeles Times, May 19, 1942.

gency, the Court will not substitute its judgment for that of the military commander. As this Court said in *Moyer v. Peabody,* 212 U.S. 78 (1909), speaking through Mr. Chief Justice Holmes:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Kelly v. Sanders,* 99 U.S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that *the same is true of temporary detention to prevent apprehended harm.* * * *" (p. 85.)

Similarly, this precept will apply when the President through his military commanders excludes persons from vital military areas to prevent apprehended harm.

The scope of the powers of the President in time of war, acting as Commander-in-Chief, were thus described in *Stewart v. Kahn,* 11 Wall. 493 (1870):

> "The President is the Commander-in-Chief of the Army and Navy, and of the militia of the several States, when called into service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the

latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." (pp. 506-507.)

There were many among those excluded who were undoubtedly loyal—some of them are now proudly wearing the American uniform. But in the light of the military situation (supra, page 9) and the characteristics of the Japanese population on the Pacific Coast as a whole (supra, page 11), there was undoubtedly reason to believe that, among this group of over 112,000 people possessing strong racial and cultural ties with the enemy, there was enough potential disloyalty, which could not be sifted by administrative hearings in sufficient time, to justify the removal of the danger within the group by the removal of the group as a whole.

Although adhering to the majority dictum in *Ex parte Milligan,* 4 Wall. 2 (1866), as to the occasion when a military commander may exercise control over civilians, the trial Court in *United States v. Yasui*[39] recognized that in view of the situation on the Pacific Coast, persons of Japanese ancestry, aliens and citizens alike, represented a reasonable classification for the regulations issued:

"The conditions and necessities of preparation for modern war had previously been recognized

[39]Now before this Court, *Yasui v. United States,* No. 871.

by this court. The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order." (U.S.D.C., D. of Ore., No. 16056; Tr. 18-19.)

The emergence of a substantial group of the supporters of Japan among the persons of Japanese ancestry at the Manzanar Relocation Center[40] resulting in serious riot and bloodshed substantiates the belief of the military authorities that there were potentially

---

[40]Excerpt from news report in San Francisco (California) Call-Bulletin, December 7, 1942:

"MANZANAR, Dec. 7 (AP). A pro-Axis celebration of the sneak attack on Pearl Harbor caused a riot in the Japanese relocation center here last night and troops called to restore order fired several shots into the surging mob, killing one Japanese and wounding nine.

Ralph P. Merritt, project director, said the rioting started Saturday night when Japanese loyal to America interfered with a meeting called by the Kibei, anti-American group. Merritt called for military assistance and the disturbance was quelled.

• • • • • • •

Last night the factions began fighting and soon there were 4,000 in a milling crowd. Shouts of 'Pearl Harbor, Banzai! Banzai!' had precipitated a free-for-all. • • •"

disloyal elements in considerable numbers among Pacific Coast Japanese.[41]

The subsequent declaration of loyalty for Japan by twenty-four per cent of American Japanese of draft age is a further indication of the existence of

---

[41]Excerpt from editorial in Seattle (Washington) Post-Intelligencer, December 9, 1942:

"Riots staged by anti-American Japanese in Arizona and California camps lead to two conclusions. One is that the Army moved none too soon in its general evacuation of Japanese from coastal areas. • • •"

Excerpt from editorial in Los Angeles (California) Times, December 9, 1942:

"Events at the Japanese centers at Manzanar and at Poston, Arizona, prove up to the hilt the necessity of Gen. DeWitt's order clearing all persons of Japanese ancestry out of the Pacific Coast military areas. The evacuation order, it will be remembered, was roundly criticized by uniformed Easterners and by some Westerners who should have known better. It is now clear that the feeling of too many Japanese was entirely unfriendly to the United States, and that considerable members of Japanese born here were included in the unfriendly group. For the safety of the Japanese themselves—and the safety of Japanese loyal to the United States at least was entitled to protection—the evacuation was wise and necessary."

Excerpt from editorial in Long Beach (California) Press-Telegram of December 8, 1942:

"The riot furnished a sufficient answer to those who have been questioning the wisdom of the Army's isolation of Japanese inhabitants of this country. All Japanese were moved away from potential war zones along the coast and placed under guard in camps of the interior for the good and sufficient reason that some of them were dangerous to the United States when this nation and Japan were involved in war, and nobody could tell certainly which of the Japanese were loyal to America and which were enemies at heart.

• • • • • • •

The violent demonstration by pro-Axis Japanese at Manzanar does not provide the evidence whereby a complete separation of the sheep and the goats can be made, but it does prove beyond any doubt that a considerable percentage of the Japanese in this big relocation camp are loyal to Japan and consequently are enemies of the United States."

a disloyal attitude toward America.[42] It is a speculation that such an expression for Japan would have been forthcoming at a hearing which would have had for its purpose the determining of whether or not the individual should remain in a Pacific Coast Military Area. The possibility that the disloyal elements would have been disclosed through the holding of individual hearings is, at least, sufficiently doubtful that it cannot be said that the Commanding General committed an abuse of discretion when he decided on the more certain course of removing all disloyal elements by removing the group as a whole.[43]

The apparent reasonableness of the evacuation was set forth by the Tolan Committee in its report[44] to Congress, wherein it declared:

> "This committee does not deem its proper province to encompass a judgment on the military need for the present (and any subsequent) evacu-

---

[42]Elmer M. Rowalt, Deputy Director of the War Relocation Authority (WRA), states that answers to the War Department's recruiting questionnaire show that the number of professedly disloyal Japanese will total about 24% of the military eligibles, ranging from 3% at the Minadoka Center in Idaho to 52% at Manzanar, California. Each of the camps has a population of about 10,000.—San Francisco Examiner (Wash. Bureau), April 30, 1943.

[43]A news article on disloyalty among Japanese at relocation centers states:

> "Many actively subversive alien Japanese have already been confined in detention camps, but it is said that fully as many, undetected in the first stages of the war, are still mingling in the centers with Japanese who have been pronounced harmless to date by military intelligence and the Federal Bureau of Investigation." (San Francisco Examiner, dated May 1, 1943.)

[44]H.R. No. 1911, 77th Cong., 2nd Sess., March 19, 1942, pp. 13-14.

ation orders. In time of war the military authorities are obligated to take every necessary step and every precaution to assure the internal safety of the Nation. The need for these safeguards appears the more pressing when we consider that present-day warfare has developed the fifth-column technique in unprecedented fashion. It is naive to imagine that the enemy powers will not exploit these techniques to the full. The tragic events of Pearl Harbor have created in the public mind a consciousness, whatever the character of the evidence, that the dangers from internal enemies cannot be ignored." (p. 13.)

"Various arguments were adduced in testimony before the committee why the Japanese, both citizen and alien, should be evacuated from the west coast. Most commonly it was said that homogeneity of racial and cultural traits made it impossible to distinguish between the loyal and the disloyal. Law enforcement officials were particularly concerned lest enraged public sentiment and possibly mob action, occasioned by reverses in the Pacific war theater, would work injury to innocent and guilty alike. Protection for Japanese residents as well as for the whole Nation was said to require the immediate evacuation of all Japanese." (p. 14.)

**B. The military commander as a matter of law was entitled to employ the precautionary and preventive measures of curfew and exclusion without conducting individual hearings.**

One of appellant's principal contentions is that he and the others evacuated with him were denied due process because the military authorities should have conducted individual hearings to determine the loyalty of persons to be evacuated. (Tr. p. 41.) As previously

noted the ready answer to this suggestion is that this Court will not attempt to judge the merits of the procedure by which the Commanding General met the military situation as against another method which might have been employed. The Court will have performed its function when it has determined that the Commanding General acted in good faith and that the adoption of the method of group evacuation was within the range of honest judgment which military commanders are allowed in meeting military problems within their jurisdiction. (*Sterling v. Constantin,* 287 U. S. 378 (1932); *Moyer v. Peabody,* 212 U. S. 78 (1909); *Stewart v. Kahn,* 11 Wall. 493 (1870).)

Because the Japanese population has remained apart from the rest of the people of the Pacific Coast and because inscrutability is a definite racial characteristic, it was at least doubtful whether any safe and practical measure for determining prospective disloyalty could have been employed.

Regarding the lack of an adequate test, former Attorney General Earl Warren of California testified before the Tolan Committee as follows:

> "We believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them, and we believe that we can, in dealing with the Germans and the Italians, arrive at some fairly sound conclusions because of our knowledge of the way they live in the community and have lived for many years. But when we deal with the Japanese we are in an entirely different field and *we cannot form any opinion that we believe to be sound.*"[45]

[45]Tolan Committee Hearings, Part 29, p. 11015.

The Attorney General of California is the chief law enforcement officer of the State. (Calif. Const., Art. V, Sec. 21.) The above statement, therefore, representing the opinion of the law enforcement officers who have observed the Pacific Coast Japanese for many years, is particularly significant.

Only a brief consideration of the task of investigating and holding hearings for 100,000 people will reveal the difficulties and scope of the task and the time required. From the matters already discussed it is evident that there were many pro-Japanese influences which might have offset the loyalty to this country which otherwise might be assumed to exist. To judge such an imponderable thing as loyalty in these cases would call for a consideration of those influences and experiences of a lifetime which go to make up the final spirit and feeling of loyalty to a country. Now, if the immediate danger has been removed and time has become available for thorough investigation, it may be possible to devise an adequate test and to separate the loyal from the disloyal. However, this would not mean that General DeWitt, in the face of the emergency, should have taken the time or have resolved doubts against employing the precaution of removing the entire group in order to secure the safety of the military area.[46]

> "* * * it can hardly be said to be unreasonable to go on the assumption that among the Japanese communities along the coast there is enough dis-

[46]Recent developments at Relocation Centers, where admittedly disloyal elements have revealed themselves, indicate that previous checks for disloyalty were misleading. (News report, San Francisco Examiner, May 1, 1943, supra note 43.)

> loyalty, potential if not active, to make it expedient to evacuate the whole. Perhaps ninety-nine peaceful Japanese plus an unascertainable one who would signal to a submarine would add up to a sufficient reason for evacuating. If it were a matter of punishment, this sort of reasoning would be brutal. But no one supposes that evacuation, any more than detention under Regulation 18B in England, *is defensible on any other basis than prevention.* When one considers the irreparable consequences to which leniency might lead, the inconvenience, great though it may be, seems only one of the unavoidable hardships incident to the war. In this judgment General DeWitt doubtless acted on such intelligence as was available, and, it is to be remembered, with the express sanction of the President and the Congress." (Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1302 (June, 1942.)

The curfew and evacuation orders were issued solely as a military measure to insure the defense of the area and to prevent sabotage and espionage rather than waiting to punish such acts after the injury has occurred. As Professor Fairman has acutely observed:

> "A commander should not be put in a worse position legally because he has contrived to keep disaster at arm's length." (Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1288 (June, 1942).)

## IV. IN TIME OF WAR MAY THE MILITARY AUTHORITIES EXERCISE CONTROLS OVER CIVILIANS RESIDENT WITHIN THE STATES?

It is the purpose of this section to discuss the general question of the right of military authorities in time of war to exercise controls, such as curfew and exclusion, over civilians in the territory of the States.

One of the prime objects of the Federal Constitution as declared by its preamble is "to provide for the common defense". This war power the Constitution divides between the President and Congress. Congress is granted the power to declare war and to provide for the common defense (Art. I, Sec. 8, Cls. 1, 11), to raise and support armies (Art. I, Sec. 8, Cl. 12), to make rules for the governance of the armed forces (Art. I, Sec. 8, Cl. 14), and to make all laws which shall be necessary and proper for carrying these powers into execution (Art. I, Sec. 8, Cl. 18). Art. IV, Sec. 4, provides that the United States "shall protect the states against invasion". Upon the declaration of a national war, the administrative task of protecting the states against invasion and conducting the war to a successful conclusion lies with the President as Commander-in-Chief of the Army and Navy and is carried out by him through his Secretary of War and the duly constituted subordinate military commanders. (*Moyer v. Peabody,* 212 U. S. 78 (1909), quoted supra, p. 38; *Stewart v. Kahn,* 11 Wall. 493 (1870), quoted supra, p. 38.)

The fundamental proposition here asserted is that the President as Commander-in-Chief, acting through his subordinate military commanders, has the power

in domestic territory lying within a theater of operations to undertake precautionary and preventive measures affecting the civilian population, which as a matter of military necessary are required for the defense of the area and the successful prosecution of the war. The need for such authority is made evident by today's type of warfare, which is waged swiftly and violently and at long range upon civilians, factories and fields far beyond the zone of action of contending armies. It places many areas, although removed from the battlefront, within a theater of operations. The supply and manufacture of war materials is so vital to success upon our world-flung battlefields that the protection against sabotage, espionage and fifth column activities within domestic territory makes the protection of home defense installations, war plants and public utilities a fundamental military concern of those charged with the responsibility of conducting the war to a successful conclusion. As this Court said recently in *United States ex rel. Quirin v. Cox* (U. S. Sup. Ct., Oct. 29, 1942, 87 L. Ed. 1):

> "Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces."

Ordinarily the constitutional rights, privileges and immunities of American citizens cannot be curtailed by military authorities, and local, state and federal laws prescribe the standards of lawful conduct. But there are occasions, in time of war when to meet an emergency the military authorities, in carrying out

their constitutional function of conducting the war, may adopt measures directly affecting the conduct of civilians and temporarily limiting their constitutional rights.

**A. Martial law in time of war.**

This particular exercise of the war power is usually described as martial rule or martial law, as distinguished from the other manifold exercises of the war power by the Executive and Congress.[47]

Speaking of Presidential Executive Order 9066, the Tolan Committee observed:

> "This order of February 19 has *established a form of limited martial law* permitting control over all persons in designated areas and resulting in the evacuation of an entire group, including citizens and aliens."[48]

When the occasion requires, individual rights such as those affected by curfew and evacuation orders must temporarily bend to the exercise of the paramount and fundamental constitutional right of the State to preserve itself. In *Shimola v. Local Board,* 40 F. Supp. 808 (D.C. Ohio, 1941), it was recently said:

> "The civil rights which petitioner contends for are more violently assailed from without than from within. The very name of the rights which petitioner champions implies a limitation on

[47]Fairman, *The Law of Martial Rule* (1930) p. 31. Concurring opinion, Chase, C.J., in *Ex parte Milligan,* 4 Wall. 2 (1866).
[48]General observations on the President's Executive Order of February 19, 1942.—Final Report, Tolan Committee, p. 21.

their use. Civil rights have always been subject to military exigency." (p. 810.)

As former Chief Justice Hughes said, when speaking of the war powers under the Constitution in an address before the American Bar Association in 1917 during another critical period in our history:

> "We are making war as a nation organized under the constitution, from which the established national authorities derive all their powers either in war or in peace. The constitution is as effective today as it ever was and the oath to support it is just as binding. But the framers of the constitution did not contrive an imposing spectacle of impotency. One of the objects of a 'more perfect union' was 'to provide for the common defense.' A nation which could not fight would be powerless to secure 'the Blessings of Liberty to Ourselves and our Posterity.' Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States. Otherwise, as Mr. Justice Story said, 'the country would be in danger of losing both its liberty and its sovereignty from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.' "[49]

Such an extraordinary exercise of power can only be justified by supervening necessity.

---

[49]Reports of A.B.A., 1917, p. 248; Sen. Doc. No. 105, 65th Cong., 1st Sess., p. 3.

Martial law is part of our common law, although an extraordinary part,[50] and in its greatest extent is an accompaniment of war.[51] It has been likened to the public right of self-defense by an individual:

> "Martial law is the public right of self-defense against a danger threatening the order or the existence of the state."[52]

As already noted, the President as Commander in Chief acting through his subordinate military commanders has the power to do all that is necessary to protect each of the states "against invasion". (Const., Art. IV, Sec. 4.) Today sabotage, espionage and the fifth column technique are the preludes to invasion. Measures taken to prevent the use of these methods of modern warfare are within the mandate of the Federal Government.

> "Thus imbedded in the very fiber of the Constitution, we find not only the authority for martial rule, but the occasions which require and justify it, and as well the limits of its operation."[53]

**B. Exclusion without a preliminary hearing as a proper exercise of martial law.**

This Court has conceded the right of the military commander to take precautionary and preventive measures such as the removal of persons from disturbed areas until the restoration of peace, without the holding of any trial.

---

[50]Pollock. *Expansion of the Common Law*, pp. 105-106.
[51]Fairman, *The Law of Martial Rule* (1930), p. 98.
[52]Wiener, A Practical Manual of Martial Law, p. 16 (1940). See also Winthrop, *Military Law and Precedents*, Reprint, p. 820.
[53]Graham, *Martial Law in California*, 31 Cal. L. R. 6, Dec. 1942.

In *Moyer v. Peabody*, 212 U. S. 78 (1909), this Court upheld the sustaining of a demurrer to a complaint seeking damages against a governor and his military commanders for detaining one Moyer, the head of a miners' organization, on the ground that it was a proper measure of martial law. The disorder was attributed to the actions of the members of the organization. It was alleged that the imprisonment, which had been for a period of two and a half months, was without probable cause and that the plaintiff had been deprived of his liberty without due process of law. As in the present case, it was alleged that no complaint had been filed against Moyer and that the civil courts were open, reliance being placed upon *Ex parte Milligan*, 4 Wall. 2 (1866), and *Ex parte Merryman*, 9 Am. L. R. 524, 17 Fed. Cas. No. 9487 (1861). (p. 80 of 212 U.S.) The Court, in upholding the judgment, first pointed out that the detentions of persons for the purpose of restoring order were not by way of punishment "but are by way of precaution to prevent the exercise of hostile power" and that when the head of the State acted upon a matter involving its life the executive could employ "temporary detention to prevent apprehended harm". (p. 85.)[54]

Moyer had previously petitioned the Colorado courts for a writ of habeas corpus to obtain his release from the military detention. (*In re Moyer*, 35 Colo. 154, 85 Pac. 190 (1904).) The writ was denied and the detention was upheld as a reasonable measure for the state military authorities to take, in these words:

---

[54]Supra, p. 38.

"To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. *He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of law* * * *. *His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the Governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress.* * * * It is true that petitioner is not held by virtue of any warrant, *but, if his arrest and detention are authorized by law, he cannot complain* * * *." (85 Pac. 193.)

*Cox v. McNutt,* 12 F. Supp. 355 (1935);

*In re Boyle* (Idaho, 1899), 57 Pac. 706;

*Ex parte McDonald,* 49 Mont. 454, 143 Pac. 947 (1914).

The conclusion to be drawn from such precautionary measures of martial law as exclusion or detention has been well stated by Wiener, supra:

"Whenever there is riot or insurrection, there are pretty certain to be ringleaders; once these are apprehended, the back of the disturbance is likely to be broken. Accordingly, commanders ordered into the field to suppress domestic disorders have almost invariably centered their attention on the heads of the offending movement, have arrested

them, and have kept them in custody until such time as the disorders subsided and/or the persons detained could be turned over to the civil authorities for trial. *In many instances, no trial ever took place; the detention was conceived to be entirely preventive and not at all punitive.* * * * This procedure, which did not involve the suspension of the writ of habeas corpus, or the supersession of civil courts by military tribunals, or indeed any domination of the civil authorities by the military but rather the closest cooperation between them, *has come fairly generally to be known as qualified martial law or preventive martial law.* Where there has been violence or disorder in fact, continued detention of offenders by the military is so far proper as to result in a denial by the courts of writs releasing those detained and a refusal, after they have been released, of damages for false imprisonment. The legality of the practice has been sustained in Idaho, Colorado, Montana, New Mexico, Indiana, and Iowa, and has received the imprimatur of approval of the United States Supreme Court in *Moyer v. Peabody.* It is, therefore, hardly open to question today."[55]

Fairman reaches a similar conclusion:

"It would seem to follow from the foregoing that preventive detention for a reasonable period is regarded by the courts as a legitimate means of coping with an insurrection, and that in the exercise of judicial discretion a writ of habeas corpus may not be allowed if it would interfere with the

---

[55] Wiener, *A Practical Manual of Martial Law* (1940), Para. 71, pp. 66-67.

governor in the performance of his duty to suppress insurrection."[56]

**C. The English courts have upheld the validity of excluding persons from vital war zones.**

If such precautionary measures may be undertaken in times of domestic unrest they are also proper in time of war when the life of the nation is at stake.

During the last World War the British House of Lords, in *Rex v. Halliday* (1917), 1 A.C. 260, affirming (1916) 1 K.B. 238, upheld the propriety of regulations by which the residence of any person could be regulated or any person excluded or interned in view of the hostile origin or *associations* of the person, when it appeared to the Secretary of State expedient for securing the public safety. The Court said:

"One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that reg. 14B is directed. *The measure is not punitive but precautionary.* It was strongly urged that no such restraint should be imposed except as the result of judicial inquiry, and *indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons.* It seems obivous that no tribunal for investigating the questions whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law.

---

[56]Fairman, *The Law of Martial Rule* (1930), Para. 44, p. 177.

No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. * * *" (p. 269.)

The Court then makes some observations which we believe are particularly pertinent to the instant case:

"However precious the personal liberty of the subject may be, there is something for which it may well be to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. *It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive.* What is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact." (p. 271.)

"One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1(a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defense of the realm." (p. 273.)

See

*King v. Governor of Wormwood Scrubbs Prison* (1920), 2 K.B. 305.

It is true that the regulations or orders provided that the internee could make any representations to an advisory committee against the order, which would then make a report to the Secretary. This in no way affected the broad discretionary power given to him, nor did it take from him the sole power to decide whether the internment order should be revoked or varied. This is evident from the language of the order, "If I am satisfied by the report * * * that the order may be revoked or varied without injury to the public safety or defense of the realm, I will revoke or vary the order * * *."

And more recently, under conditions of World War II, where sabotage and espionage are being employed as instruments of warfare as never before, the English Courts have upheld the power of the Executive to remove or detain citizens whose actions might endanger the conduct of the war.[57] In *Liversidge v. Anderson* (1942), 1 A.C. 206, the House of Lords upheld the internment of a British citizen under Regulation 18B of the Emergency Powers (Defense) Act of 1939 (2 and 3 Geo. VI, c. 62), which provided that the Secretary of State could make detention orders "with a view to preventing (the internee) acting in a

[57]In Canada regulations similar to the English regulations have been adopted. By the order of the Minister of Justice, dated August 18, 1942, a protected area in the Province of British Columbia along the Pacific Coast has been prescribed similar to the Pacific Coast Military Areas, which order provides in part:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police." (*Canadian Gazette*, Extra No. 96, August 31, 1942.)

manner prejudicial to the public safety or defense of the realm." The House of Lords reiterated what it had previously said in *Rex v. Halliday,* supra:

> "At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possessed for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention." (Per Lord Macmillan, p. 47.)
>
> *Greene v. Secretary of State for Home Affairs* (1942), 1 A.C. 284.

In commenting upon the English decisions Professor Fairman says:

> "All of this, one may say, is no precedent for construing our own Constitution. But where kindred people who once held the same doctrines as ourselves have been driven to adopt new views of war power, that experience is most persuasive in weighing the authority to be conceded to our own government in like emergencies."[58]

**D. The decisions of the District Courts.**

In *Ex parte Kanai,* 46 Fed. Supp. 286 (D.C., E.D., Wisc., July 29, 1942), the petitioner, an American citizen of Japanese ancestry, resident in San Francisco, California, sought to obtain his release upon a writ of habeas corpus when he was taken into custody in Milwaukee, Wisconsin, for his return to San Francisco to stand trial on an information charging him under Public Law 503 with having left Military Area

---

[58]Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harvard L. R. 1253, 1256 (June 1942).

No. 1 contrary to the exclusion orders of Lieutenant General DeWitt. His petition challenged the constitutionality of Presidential Executive Order 9066, the particular Exclusion Order, which was identical with the one here under review, and Public Law 503. The Court, in denying the petition, held that the exclusion of all persons of Japanese ancestry from the Pacific Coast was a constitutional exercise of the war power:

> "* * * This court will not constitute itself as a board of strategy, and declare what is a necessary or proper military area. * * * The field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. * * * The theater of war is no longer limited to any definite geographical area. Saboteurs have already landed on our coasts. This court can take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast." (p. 288.)

> "Rights of the individual, under our federal Constitution and its amendments, are not absolute. When such rights come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. * * * *In re Schroeder Hotel Co.* (CCA, 7th), 86 F. (2d) 481; *Hitchman Coal & Coke Co. v. Mitchell, et al.*, 245 U. S. 229. * * * That there is nothing about the executive order, or the designation of the military areas, which is unconstitutional, is very certain, considering the necessities

> and the exigencies of war which have already struck upon our Pacific Coast." (p. 288.)[59]

In *Ex parte Ventura,* 44 Fed. Supp. 520 (W.D., Wash., N.D., 1942), a Japanese American citizen, resident of Seattle, sought by a petition for a writ of habeas corpus to challenge the validity of the curfew orders as imposed upon American citizens of Japanese ancestry. The Court upheld the curfew orders as a proper military measure in the light of conditions within the Western Theater of Operations.

> "I do not believe the Constitution of the United States is so unfitted for survival that it unyieldingly prevents the President and the Military, pursuant to law enacted by the Congress, from restricting the movements of civilians such as petitioner, regardless of how actually loyal they perhaps may be, in critical military areas desperately essential for national defense." (p. 523.)

**E. Martial law by the test of necessity may be limited.**

It is not necessary for the military authorities to replace civilian authorities completely. Under martial law all civilian functions may be taken over, or it may be limited to particular phases concerning the defense of a military area such as the institution of curfew,

---

[59]In *United States v. Korematsu* (U.S.D.C., N.D., Cal., S.D., No. 27635-W, 1942) the defendant, an American Japanese resident in San Francisco, by demurrer raised objections, similar to those offered by appellant, to an information charging him under Public Law 503 with having violated an exclusion order. The demurrer was overruled by Judge Martin I. Welsh on December 1, 1942, and Korematsu was tried and convicted by Judge A. F. St. Sure (S.F. Recorder, December 9, 1942). An appeal has been taken to the Ninth Circuit Court of Appeals (No. 10,248). Certain procedural questions certified by the Ninth Circuit Court are now before this Court for decision.

dim-out,[60] and the requiring of the evacuation of certain persons as in the present case.

As Winthrop says in *Military Law and Precedents,* Reprint, page 820:

> "Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction or materially restrict the liberty of the citizen; it may call upon him to perform special service or labor for the public defense, but otherwise usually leaves him to his ordinary avocation."

*Commonwealth ex rel. Wadsworth v. Shortall,* 206 Pa. St. 165, 55 Atl. 942 (1903);

*Ex parte McDonald,* 49 Mont. 454, 143 Pac. 947 (1914);

*In re Boyle* (Idaho, 1899), 57 Pac. 706.

One of the best expressions of the principle is contained in Bishop, *New Criminal Law,* 8th Ed., sec. 53 (1892):

> "Martial law is elastic in its nature and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of civil authority; or its touch may be light, scarcely felt

[60]Opinion NS4826 of Attorney General of California, holding that Dim-out Proclamation No. 12 (Oct. 10, 1942, 7 Fed. Reg. 8377) by Lieutenant General J. L. DeWitt, was a proper exercise of limited martial law which superseded lighting requirements of the California Vehicle Code.

or not felt at all by the mass of the people, while the Courts go on in their ordinary course, and the business of the community flows in its accustomed channels."

**F. A declaration of martial law is not required.**

Appellant argues that martial law has not been declared on the Pacific Coast. (Tr. 40.) The fact that martial law has not been proclaimed in Washington, Oregon or California or that the military authorities have not taken over all civilian functions does not mean that the within principles of martial law do not apply to the measures undertaken by the military authorities on the Pacific Coast. No formal declaration of martial law was needed as a prerequisite to the measures of martial law which have already been undertaken. If the necessity exists to exercise military control in a particular manner, a proclamation is unnecessary. It is the necessity which provides the justification, not the issuance of a proclamation.[61]

The trial court in *Yasui v. United States* (No. 871) rejected the concept that the military authorities could exercise limited martial rule such as the imposition of curfew. This is opposed to the weight of authority,

---

[61] *Executive Order 9066.* No declaration of martial law accompanied the issuance of Presidential Executive Order 9066 under which the evacuation of Japanese-Americans from Pacific Coast military areas was accomplished.

Professor Charles Fairman, the author of "The Law of Martial Rule" (1930), commented on this fact as follows:

> "The President has made no such proclamation and if he did his constitutional powers would not be increased one whit. The question in every case of military control would still be, can the action complained of be justified as apparently reasonable and appropriate, under the circumstances to the defense of the nation and the prosecution of the war?" (San Francisco Chronicle, March 4, 1942, p. 14.)

which is collected and discussed in Fairman, *Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1287, and in Wiener, *A Practical Manual of Martial Law* (1940), p. 19.

**G. The test of necessity.**

The test of necessity which will justify the exercise of military authority over civilians should be formulated and applied in accordance with today's military problems. It is contended that the curfew and exclusion orders were not valid because no invasion of the States of Washington, Oregon and California had deposed the civil authorities or had closed the civil courts. Reliance for this proposition that the justifying situation must be in this extremity before a military commander can act is placed mainly upon the dictum of the majority in *Ex parte Milligan,* 4 Wall. 2 (1866). Because of the frequent reference to this famous Civil War case, a close analysis is justified in order to show the proper application of what was said in that case.

In 1864 Lambdin P. Milligan, a civilian and resident of the State of Indiana, was arrested by order of General Hovey. He was tried before a military commission convened at Indianapolis, on various charges of aiding the Southern cause, and sentenced to be hanged. At the time of the arrest Indiana was not threatened with attack, although previously Southern troops had invaded the State. Milligan's petition for a writ of habeas corpus reached the United States Supreme Court upon a certificate of disagreement from the Federal Circuit Court. The writ was granted upon the ground that Congress, to whom, the Court

said, the power was committed, had not authorized trial by military commission.[61a] The decision, joined in by all members of the Court, disposed of the case upon jurisdictional grounds. However, a bare majority of five went on gratuitously[62] to say that Congress in any case would not have had the power to authorize trial by military commission at any place outside the theater of active war, because, it said:

> "Martial law cannot rise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the Courts and deposes the civil administration. * * * Martial rule can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (p. 127.)

On the other hand, a minority of four, led by Chief Justice Chase, in a specially concurring opinion, took issue with this dictum and contended that:

> "Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great

---

[61a]Congress had provided that if those arrested by Presidential authority were citizens of States *where the administration of law by the Federal Courts was unimpaired*, the lists of these citizens must be sent to the local Federal Judges, who could then release any prisoner not indicted by the next Federal Grand Jury; the statute said nothing about military trials of such prisoners. (12 Stat. 755 (1863).)

[62]Haney, C.J., dissenting in *Zimmerman v. Walker*, 132 Fed. (2d) 442 (1942), states that the general statement of the majority was not dicta (p. 450). Nevertheless, the right of the military to impose restrictions upon civilians within the United States when reasonably necessary to *repel* invasion is recognized.

> and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline and security of the army or against the public safety." (p. 140.)

Because of the frequent reference made in this case to the fact that the Courts in this combat zone were open and in the proper and unobstructed exercise of their jurisdiction, it is important to note that this part of the majority dictum must be confined to the serious question of whether or not and upon what occasion a civilian may be tried by military commission.[63] It is difficult to perceive what application, one way or another, the fact that the Courts are open or not would have upon a determination of the justification for the Army's taking precautionary measures to prevent sabotage and espionage and to protect the civilian population within a theater of operations.

The view of the majority that martial law must be confined to the locality of actual war does not require a change of this phase of the test of necessity but merely a new and realistic conception of the locale of war being waged today. In 1866, when the Supreme Court rendered the Milligan decision, the methods of warfare were such that a civilian government would be disrupted and unable to secure public safety at home only when a locality lay under the seige guns of an attacking force. The Court then was lookng at a scene where the principal offensive force was the foot

---

[63] As the Court itself puts the question, "Upon the *facts* stated in Milligan's petition, and the exhibits filed, has the military commission mentioned in it *jurisdiction*, legally, to try and sentence him?" *Ex parte Milligan*, 4 Wall. 2, 118 (1866). (Italics by the Court.)

soldier and cavalry and where civilian authority could carry out its function of maintaining the safety of citizens until it was forced to flee by the imminent danger of capture. Seventy-seven years ago the theater of actual war wherein the army might have to exert control was the area of operations of the contending armies.[64]

Even during the last World War, in *United States ex rel. Wessels v. McDonald,* 265 Fed. 754 (1920), a Federal Court held that New York Harbor was "within the theater of war". The decision upheld the authority of a naval court martial to try the plaintiff, Herman Wessels, as a German spy because of his espionage activities in the vicinity of New York Harbor. Wessels contended that on the basis of the *Milligan* case, the naval court had no jurisdiction to try him because his activities were in the United States, rather than in Enrope where the fighting was going on. Furthermore, he contended the Federal Courts in

---

[64]But even in 1904, Sir Frederick Pollock, a student of martial law, wrote:

"It also seems that the range of those acts must extend to the prevention of aid and comfort to the enemy beyond the bounds of places where warlike operations are in sight. In many places there may outwardly be peace, and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies, and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold or more. By recognizing this fact we do not alter the law, but apply it to the facts as they exist; nor do we disparage the wisdom of our predecessors who declared their opinion of the law in a form appropriate to the facts as known to them."—Sir Frederick Pollock, Law Quarterly Review, Vol. XVIII, p. 152 (1904).

"What was not necessary a century ago may be necessary today."—Haney, J., dissenting in *Zimmerman v. Walker,* 32 Fed. (2d) 442.

the New York Federal District were functioning. On appeal the Federal Court upheld the jurisdiction of the naval court and pointed out:

> "The term 'theater of war', as used in the Milligan case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. Great numbers of troops were being sent abroad, and in large numbers, sailing from the Port of New York. * * * Ships were being destroyed within easy distance of the Atlantic coast; there was a constant threat of and fear of airships above the harbor and City of New York on missions of destruction." (p. 764.)

What the Court said twenty-three years ago is now many times as obvious and applicable to the present situation on the Pacific Coast. A review of the authorities indicates that there is general agreement that the majority dictum went too far when it said that martial law cannot arise from a threatened danger; that the Courts and civil administration must already have been deposed.

Fairman, *The Law of Martial Rule* (1930), p. 145;

Willoughby, *Constitutional Law,* 2nd Ed. III, 1602;

Glenn, *The Army and the Law,* 188-190.

The dictum of the majority fails to meet today's wartime conditions. It requires an invasion and the complete breakdown of civil government before the military may act.

Insistence upon applying the dictum of the *Milligan* case to today's conditions may be a judicial example of the disastrous error into which many democracies have fallen—that of affording more protection to the civil liberties at home than to safeguarding them from the attacks from without.

Former Chief Justices Hughes, speaking before the American Bar Association in 1917 about the test in the *Milligan* case, said:

> "Certainly, the test should not be a mere physical one, nor should substance be sacrified to form."[65]

In 1919 Judge Learned Hand, writing in *Commercial Cable Co. v. Burleson,* 255 Fed. 99 (1919), with reference to the President's power as Commander-in-Chief to take over cable lines for war use, declared:

> "But, indeed, it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theater of military operations." (p. 104.)

Today our nation-wide civilian defense preparations illustrate that many areas of the United States can be considered a theater of war. This was recently and vividly made clear by the landing on our eastern shores of German saboteurs whose sabotage objectives lay in various places in the East and Midwest. (*Ex parte Quirin,* supra.) Today long-range bombing planes and carrier-based aircraft and far-roving submarines place a large portion of our country and States within the area of threatened invasion.

---

[65] *War Powers Under the Constitution,* A.B.A. Rep., 1917, p. 248; Sen. Doc. 105, 65th Cong., 1st Sess., p. 3.

*Ex parte Ventura,* 44 Fed. Supp. 520, 523 (1942);
*Ex parte Kanai,* 46 Fed. Supp. 286, 288 (1942).

---

### V. EXTENT OF JUDICIAL REVIEW OF ACTION TAKEN BY MILITARY AUTHORITIES.

In *Sterling v. Constantin,* 287 U. S. 378 (1932), this Court declared:

> "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." (p. 399.)

It is quite clear that this Court had in mind that a military commander in time of war, charged with the awful responsibility of conducting his mission as part of the whole plan for the successful conduct of the war and the protection of civilians within his command, must be allowed a wide choice of the means by which he will meet emergencies affecting his mission. As this Court pointed out in the *Sterling* case, the Executive acting in his military capacity will be allowed "a range of honest judgment as to the measures to be taken * * *, *for without such liberty to make immediate decisions, the power itself would be useless*". (p. 399.)

To hold the curfew and evacuation orders invalid, the Court would have to say that there was no foundation for a military commander to believe that the Japanese population on the Pacific Coast had to be, as a whole, moved inland.

As Mr. Justice Haney said in *Zimmerman v. Walker,* 132 Fed. (2d) 442:

> "Where the military asserts a right to exercise *some powers of government, usually in the form of restrictions,* and do not approach a complete military government, the right, if it exists at all, comes from the right to do all that is necessary 'to execute the Laws of the Union, suppress insurrections and repel invasions' and to protect each of the states 'against Invasion'. Compare: Winthrop, supra, 1275. Whether a particular action is 'necessary' is a question of fact to be determined from proof of, among other things, the reason for the restriction, its purpose, and the improvement of methods and engines of war. What was not necessary a century ago, may be necessary today.
>
> * * * * * * *
>
> "If the courts find that the action of the military is reasonably necessary to accomplish one of the four purposes mentioned above, then the case is ended because the Constitution prohibits further action by the courts, but if the court makes a contrary finding, it has the Constitutional duty to carry out its function to declare the military action ineffective." (at pp. 450, 451, 452.)

The possibility that disloyalty, either potential or active, could have been disclosed through the holding of individual hearings is at least sufficiently doubtful, particularly in view of the time element, so that it can be said that General DeWitt certainly did not abuse his discretionary powers or go beyond the range of his honest judgment when he decided to remove all persons of Japanese ancestry, as a group, from

the vital Pacific Coast military areas. The evacuation was obviously conceived in good faith in the face of the emergency and directly related to the danger at hand.

As the United States District Court for the Southern District of New York said in *United States v. Uhl,* 46 Fed. Supp. 618 (1942), with reference to the President's proclamation in ordering the detention of enemy aliens:

> "This court, in times like these, will resolve any doubts it may have * * * in favor of the President's and Attorney General's actions."

Or, as the trial court said:

> "Nor can defendant substitute his judgment for the judgment of the Commander in Chief and the general acting under the President's direction, pursuant to constitutional powers and the Congressional ratification and authority of Public Law 503." (46 Fed. Supp. 657, 662 (1942).)

The argument here presented can well be concluded with what the Circuit Court of Appeals for the Ninth Circuit recently said in *Zimmerman v. Walker,* 132 Fed. (2d) 442 (1942), concerning detention as a proper preventive measure of martial law:

> "The civil courts are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges. Their province is to determine questions of guilt or innocence of crimes already committed. In this respect their functions are punitive, not preventive; whereas the purpose of the detention of suspected persons in critical military areas in time of war is to forestall injury and to prevent the commission of acts helpful to the enemy. It is settled that the

> detention by the military authorities of persons engaged in disloyal conduct or suspected of disloyalty is lawful in areas where conditions warranting martial rule prevail. Measures like these are essential at times if our national life is to be preserved. Where taken in the genuine interest of the public safety they are not without, but within, the framework of the constitution." (p. 446.)

Likewise, with the less severe measure of exclusion, persons suspected of disloyalty may be excluded from a military area in time of war where such exclusion has a reasonable bearing upon the defense of the area.

---

## VI. CONGRESS HAD THE POWER TO ENACT PUBLIC LAW 503 IN AID OF THE PRESIDENT'S POWER AS COMMANDER-IN-CHIEF AND THAT OF HIS SUBORDINATE COMMANDING GENERALS TO MAKE RULES PERTAINING TO THE CONDUCT OF CIVILIANS IN PRESCRIBED MILITARY AREAS.

### A. Public Law 503 Did Not Delegate Authority to the President.

Thus far it has been demonstrated that the President as Commander-in-Chief and his military commanders, in the exercise of their constitutional power to conduct the war and to protect the Pacific Coast States against attack and threatened invasion could impose curfew regulations upon all persons of Japanese ancestry and could order them to evacuate these areas. The next important question which the *amici curiae* wish to discuss is the validity of Public Law 503 (77th Cong., 2nd Sess., Ch. 191, March 21, 1942) under which the appellant was convicted for having violated the curfew proclamation and Exclusion Order 57 (Tr. 1-2).

The States of Washington, Oregon and California are vitally interested in having upheld the validity

of this Act, which provides a sanction under federal criminal law for the enforcement of the measures which the Commanding General has adopted or may in the future adopt for the protection of the Pacific Coast, as, for example, Proclamations Nos. 10 (Aug. 5, 1942, 7 Fed. Reg. 6631) and 12 (Oct. 10, 1942, 7 Fed. Reg. 8377), providing for dim-out. Public Law 503 specifically refers to entering, remaining in or leaving a prescribed military area or the doing of any other act contrary to the restrictions applicable in the area, or to the order of the Secretary of War or any designated military commander. A person cannot be found guilty thereunder unless he knew or should have known of the existence and the extent of the restrictions and orders and that his act was in violation thereof. This law is attacked on the ground that it improperly delegates to the President, the Secretary of War or any designated military commander the power first to designate the military area or zone and then to determine the acts prohibited therein, the doing of which the law makes criminal. (Tr. 42.)

Public Law 503 is not an unconstitutional delegation because the power to designate military areas in domestic territory and, under military necessity, to forbid the doing of acts therein already resides in the President and his subordinate military commanders by virtue of the war power. (Supra, Pt. 2.) This right to prescribe the military areas and to make restrictions therein resides in the military authorities without any authority from Congress.

All this law attempts to do is to provide for enforcement in the Federal criminal courts of the orders

issued by the military authorities pursuant to the war power of the President. That this was its purpose is evident from the congressional debates on the law at the time of its passage.[66]

The United States Supreme Court has recognized the power of Congress to provide sanctions for the carrying out of the constitutional powers of the Presidency. In *United States v. Curtiss-Wright Corporation,* 299 U. S. 304 (1936), the Supreme Court upheld a criminal statute passed for the purpose of assisting the President in carrying out his constitutional power to deal with foreign affairs. A congressional resolution authorized the President to prohibit the sale of munitions of war in the United States to countries engaged in war in the Chaco region of South America, except under such limitations and exceptions as he might prescribe, whenever he found that such prohibition would contribute to the reestablishment of peace between the countries involved. The resolution in effect provided a fine and/or imprisonment for sales made in violation of the proclamation (p. 312). The President thereafter made such findings in his proclamation. An indictment charging a violation of the Joint Resolution and the Proclamation of the President was demurred to on the grounds that the resolution constituted an unlawful delegation of legislative power to the executive. In part it was contended that the resolution was unconstitutional because it only went into effect upon the making of a proclamation which was left to his unfettered discretion, thus con-

[66]Congressional Record, March 19, 1942, pp. 2804, 2807 (unbound ed.). (House Report No. 1906, 77th Cong., 2nd Sess., pp. 2-3.)

stituting an attempted substitution of the President's will for that of Congress, and also that the extent of its operation in particular cases was subject to limitations and exceptions by the President, controlled by no standard. In rejecting these contentions (p. 329) the Court said that in in such external matters as foreign affairs and the waging of war the general rule regarding unlawful delegation of legislative authority either did not apply to such matters or would be very broadly construed.

> "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."

Similarly the same freedom of action must be allowed the Commander-in-Chief in his conduct of the war. Part of the President's war power is the right to establish certain measures of control over civilian activity when military necessity requires, otherwise described as limited martial rule or law. This right is derived from his constitutional position and does not require an act of Congress for its exercise. Pointing out that the power to conduct foreign affairs was derived from the constitutional powers of the President, the Court said:

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the

> President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—*a power which does not require as a basis for its exercise an act of Congress,* but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." (pp. 319-320.)

Congress, to assist the President in performing his constitutional duty as Commander in Chief, may by statute provide a sanction to be administered in the Federal Courts, just as Congress did in the *Curtiss-Wright* case, to assist the President in carrying out his function in the field of international relations. In the *Curtiss-Wright* case the statute was upheld although it provided a punishment for the violation of the President's proclamation, which was to be made after the passage of the congressional act.

**B. If Public Law 503 is considered as a delegation, such delegation was not unconstitutional.**

While it is believed that Public Law 503 is valid when construed as a law which merely provides a sanction for the carrying out of an otherwise proper constitutional power committed to the President, nevertheless this law is not unconstitutional if it is interpreted as delegating to the President, the Secretary of War or designated military commanders the power to define military areas or zones and to prescribe restrictions therein, the violation of which the statute makes criminal.

Speaking of the delegation of the Congressional war power, it was recently said in *United States v. Wright,* 48 Fed. Supp. 687 (Jan. 1943):

> "* * * I find that no court has ever attempted to strike down what Congress has determined to be appropriate to carry into effect its broad war powers under the Constitution. In fact, the question of delegation has seldom, if ever, appeared in connection with a construction of the war power." (p. 689.)

In judging the use of Congressional war power, this Court said in *Hamilton v. Kentucky Distilleries, etc.,* 251 U. S. 146, 40 S. Ct. 106 (1919):

> "* * * to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; * * *" (p. 163.)
>
> *Martin v. Mott,* 12 Wheat. 19, 30 (1827);
>
> *Dakota Cent. Tel. Co. v. State,* 250 U. S. 163, 39 S. Ct. 507 (1919).

A case directly in point on the right of Congress to leave to the Executive the designation of the area within which an act may be criminal is *McKinley v. United States,* 249 U. S. 397 (1919), wherein an Act of Congress authorizing the Secretary of War to do everything "deemed necessary to suppress and prevent the setting up of houses of ill fame * * * within such distance as he may deem needful of any military camp * * *" was not held to be an unconstitutional delegation of legislative power. As stated by the Court:

> "Congress may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions."

In other phases of federal activity, the Courts have upheld legislation making the violation of regulations a criminal act. In *Avent v. United States,* 266 U. S. 127 (1924), the Transportation Act (41 Stat. 456) authorized the Interstate Commerce Commission, whenever it is of the opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to make such reasonable rules with regard to it as in the Commission's opinion will best promote the service in the interest of the public and the commerce of the people. It also authorized the Commission to give directions for preference or priority in the transportation or movement of traffic. The defendant was indicted for a violation of a priority order. Holding that no constitutional question was involved, the Court said:

> "That it (Congress) can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce Commission v. Illinois Central Railroad Co.,* 215 U. S. 452; *United States v. Grimaud,* 220 U. S. 506.
>
> "The statute confines the power of the Commission to emergencies, and the requirements that the rules shall be reasonable and in the interest of the public and commerce fixes the only standard that is practicable or needed.

"Congress may make violations of the Commission's rules a crime."

The standard implied in Public Law 503 is that the restrictions must be appropriate to the conduct of the war in a military area. Orders of the military authorities beyond this test would be held to be *ultra vires* as being beyond the constitutional powers of the armed forces. In other words Public Law 503 is likewise confined to emergency situations and impliedly contains the requirement that the measures must bear a reasonable connection to military necessity. This is the only practicable standard which Congress could set down. What restrictions would be appropriate will change, from time to time and from place to place, with the changing war situation. It is the only standard under the circumstances "that is practicable or needed". (*Avent v. United States,* supra.)

With reference to the violation of Civilian Exclusion Orders such as No. 57, the one immediately involved here, it is important to note that the standard for these evacuation orders is specifically set forth in Public Law 503, which declares that "whoever shall enter, *remain in,* leave, * * *" any prescribed military area or zone contrary to the restrictions applicable in the area or zone shall be guilty of a misdemeanor. Hence, having in mind the foregoing authorities with reference to the power of Congress to authorize the issuance of regulations by executive branches of the government for the purpose of applying a standard and to make a disobedience of such regulations a

crime, it clearly appears here that with reference to Civilian Exclusion Orders such as No. 57, the standard of remaining in a military area or zone is clearly set in the statute.

In *Campbell v. Chase National Bank,* 5 Fed. Supp. 156 (1933), Congress (Title 50, App. sec. 5) authorized the President in time of war or other national emergency recognized and declared by him, to investigate, regulate and prohibit exporting, hoarding, melting or earmarking of gold or silver coin, etc. He was also authorized to make necessary rules and regulations. The Court, in holding that this grant of authority was not an unconstitutional delegation, declared:

> "It is now also settled that a regulation made within the mandate of such delegated power may be the basis of criminal proceedings." (Citing cases and *McKinley v. United States,* 249 U. S. 397.)

It should be noted that it is Congress which makes the disobedience of the military restrictions a crime and that no effort is made by the military authorities to prescribe, limit or enlarge the criminal penalty. In *United States v. Grimaud,* 220 U. S. 506 (1911), it was held that a statute providing that the Secretary of Agriculture "may make such rules and regulations * * * to regulate the use and occupancy (National Forest Reservations) and to preserve the forests therein from destruction; and any violation of the provisions of this act and such rules and regulations shall be punished" as provided by statute, was not an

invalid delegation of legislative power, the Court saying:

> "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

In the instant case the restrictions and orders are based upon military necessity and the carrying out of the President's power to conduct the war. The violation of these restrictions and orders based upon military necessity is made a crime, not by the President, the Secretary of War or the military commander, but by Congress. The statute, not the President, the Secretary or the military commander, fixes the penalty.[67]

**C. Ratification of curfew and exclusion orders by Congress.**

Assuming that it was necessary for Congress to authorize the imposition of curfew and the exclusion of persons from military areas, the legislative history of the Act shows that the purpose of its passage was to implement the orders issued under Executive Order 9066 by providing for enforcement in the federal criminal courts, and that Congress had before it Public Proclamations Nos. 1 and 2, designating the military areas and specifically stating that such persons or classes of persons as the situation required

---

[67]For a useful discussion on the general question of the delegation of Congressional war power, see Charles Evans Hughes, *War Powers Under the Constitution*, Reports of A.B.A., 1917, p. 248; Sen. Doc. 105, 65th Cong., 1st Sess.

would be excluded from these areas. Curfew was likewise contemplated.[68]

**D. Public Law 503 is not invalid on the ground of uncertainty.**

The contention is made that Public Law 503 is invalid because it falls within the rule that a criminal statute which does not define with certainty the acts prohibited is void. It is charged that the law does not inform a person of the nature and cause of the charge to be made against him and therefore violates the Fifth and Sixth Amendments to the United States Constitution.

The fundamental reason for all rules regarding certainty in criminal statutes is that a man cannot be punished for the doing of an act unless he had an opportunity to know just what was prohibited and just what was permitted. Where a statute itself defines the prescribed act with certainty, the law says that ignorance of the terms of the statute is no excuse. The ready answer to the objections to Public Law 503 on the ground of uncertainty is that the law is far more considerate of an accused and fulfills the re-

---

[68] "The purpose of the proposed legislation is to provide for enforcement in the Federal criminal courts of orders issued under the authority of Executive Order No. 9066, dated February 19, 1942."—Letter of the Secretary of War to the Congress. (Congressional Record, March 19, 1942, p. 2804 (unbound ed.); House Report No. 1906, 77th Cong., 2nd Sess., p. 2.)

"• • • the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce *curfew* and other restrictions within military areas and zones."—Letter of the Secretary of War to the Chairman of the Senate and House Committees on Military Affairs. (Congressional Record, March 19, 1942, p. 2807 (unbound ed.); House Report No. 1906, 77th Cong., 2nd Sess., p. 2.)

quirements of certainty with much greater strictness than the ordinary rules require, because it provides that a person can be punished only "if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof".

---

**SUMMARY.**

In summary, the States of California, Oregon and Washington submit that the curfew and exclusion orders as they apply to all persons of Japanese ancestry in Pacific Coast military areas were imposed by the military commander in good faith, acting under the authority of the President as Commander-in-Chief; that they were not arbitrary but were appropriately directed to securing the safety of the Pacific Coast against threatened invasion, attack and from sabotage and espionage. This is established by the following factors:

1. This nation was suddenly thrust into war with the Empire of Japan.

2. There was a definite threat that the Pacific Coast would be attacked by air and sea and possibly invaded by land.

3. There were naval attacks upon coast defenses and installations on the California and Oregon coasts and continual sinkings and attacks upon coastwise shipping and convoys; Alaska was subjected to air attack and some of the islands within the Western

Defense Command were actually occupied by the enemy.

4. Over 112,000 persons of Japanese ancestry were concentrated in the three Pacific Coast States, many in the vicinity of national defense plants, materials and utilities.

5. This large group had cultural, religious, ideological and family ties with the enemy which had been maintained and strengthened by the activity of numerous pro-Japanese organizations.

6. A considerable number of Japanese American citizens had been indoctrinated through education in Japan.

7. The alien Japanese controlled the business of the Japanese communities and the activities of the Japanese organizations. The native-born Japanese were in the younger age groups and subject to the influence and control of their alien parents.

8. The possibility that the disloyal element in the group would be used as a fifth column for sabotage and espionage and assistance in the event of an invasion could not be overlooked.

9. The continued presence of these people within critical areas might have been the cause of serious anti-Japanese disturbances which would have interfered with the internal security of the area and might have been the cause of reprisals upon American civilians and soldiers in the hands of the Japenese government.

10. In the face of the emergency, time alone would not permit the holding of individual hearings. Be-

cause of the general inability to fathom the oriental mind, and because no adequate test could be devised to determine loyalty with the sureness which the situation required, the action of the Commanding General in removing the Japanese population as a group from the critical areas was a reasonable method of dealing with the situation. It was obviously conceived in good faith.

11. The Commanding General acted under express authority from the President and the Congress.

The States of the Pacific Coast believe that the matter of moving inland the Japanese population from military areas must be treated solely from the military viewpoint that such action was necessary to meet the threat of invasion, to provide for the defense of the area and to protect against sabotage, espionage and fifth column activities.[69] The possibility of the return of this group before the time when the military authorities believe that the safety of the Pacific Coast from these dangers will permit is looked upon with grave concern by the civil authorities of California, Washington and Oregon.

It is doubtful if the police power of the States in such a matter as this, which concerns national war policy, would be adequate to take action with reference to those Japanese possessing American citizenship. Furthermore, the civil criminal law is designed to punish for injury after it has occurred, but is wholly inadequate to take preventive action.

---

[69]Note statement of Smith Troy, Attorney General of the State of Washington urging that the evacuation should be treated as a military problem.—Tolan Committee Hearings, Seattle, Part 30, p. 11,503.

"Martial rule, as we have seen, is the law of necessity; civil government is not. The danger is that we may get into the habit of trying to solve through civil government matters that are not capable of solution by our ordinary democratic processes. This may cause us to take short cuts that violate both constitutional and statutory law. We will be encouraged to substitute for a government of laws, a government of men who will determine for themselves the necessity for extra-legal action. If we do this, we are breaking down the Constitution and principles of free government for which we are fighting. Furthermore, it is doubtful that upon the return to peace we would be able to get back our democratic processes, the type of local government and the civil rights which we had at the beginning of the war.[69a]

For these reasons it is believed that in conformity with the principles of martial law, which is the law of necessity, military commanders in time of war within military areas should be able to control the activities of the civilian population within such areas to the extent that the military situation requires such control. They should be able to adopt measures for the defense of the area and to facilitate the prosecution of the war.

What is military necessity in time of war changes with the change in the methods and strategies of war-

---

[69a] Warren, *War-Time Martial Rule in California*, Cal. State Bar Jr., July-August, 1942, pp. 201-202.

fare. Today the military should not have to wait until an invasion has closed the Courts and deposed the civil government before acting in the defense of the nation's interest. In choosing the method by which an emergency will be met the military commander should be allowed a range of honest judgment. However, the Courts must remain the final arbiter of whether or not the officer has acted in good faith and within the range of such judgment.

Congress, under Public Law 503, has validly provided a sanction for the enforcement of the military regulations. These regulations are not issued by way of any delegation but are under the war power of the President as Commander-in-Chief. Even if this statute is tested from the standpoint of delegation, the delegation, being under the broad scope of congressional war power, is not unconstitutional.

**Some general observations on the fundamental issue.**

The considerations advanced here are made with a realization of the importance of preserving the fundamental rights of all citizens, regardless of race or color. The genius of America has been its ability to accommodate men of different races, creeds and colors and to remove the distinctions based on these differences. Wars with the land of origin sometimes sharply reveal the distinctions which still exist and point to the need for continued Americanization.[70]

But in time of war it is obvious that the great constitutional guaranties of personal and property

[70]Tolan Committee Final Report (H. R. No. 2124, 77th Cong., 2nd Sess., May 1942), p. 11.

rights are not absolute and must bend to the paramount and fundamental right of the public person, the State, to preserve itself. As former Chief Justice Hughes said, when speaking before the American Bar Association in 1917 at another critical period of our history:

> "We are making war as a Nation under the constitution, from which the established national authorities derive all their powers either in war or in peace. Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States."[71]

There is little merit in the contention that such control exerted for reasons of military necessity such as that which has been reviewed here will lead to military dictatorship. Protection against excessive military action lies in our Courts, in the non-political character of our Army and Navy, in an independent Congress, and in the need for securing popular support for the conduct of the war. Because the military authorities, under the paramount duty to preserve the nation, may find it necessary for military reasons to limit temporarily, within military areas, the usual freedom of action of our citizens or the use of their property does not mean that these rights will remain restricted throughout the indefinite peaceful future

---

[71] *War Powers Under the Constitution*, Reports of A.B.A., 1917, p. 248; Sen. Doc. 105, 65th Cong., 1st Sess., p.....

which it is hoped lies before us.[72] As the Tolan Committee concluded:

> "Emergency measures must not be permitted to alter permanently those fundamental principles upon which this National was built."

This will not happen while this Court sits.

At another critical war period in our history the great Lincoln was also charged with the destruction of constitutional liberties because of certain controls which he exercised through his military commanders. Speaking with that remarkable ability to summarize a great constitutional principle in a homely phrase, he said he could no more believe that the American people, through military action during time of war, would lose the right of public discussion, the liberty of speech and press, the law of evidence, trial by jury and habeas corpus during times of peace any more than he could believe that "a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life".[73]

As martial law is the law of necessity and is limited in extent by the demands of necessity, such controls as curfew and exclusion from military areas must pass with the passing of the emergency which called them forth. Judged by this principle, the Commander-in-Chief and his subordinate military commanders

---

[72]Tolan Committee Final Report (H. R. No. 2124, 77th Cong., 2nd Sess., May 1942), p. 11.

[73]Carl Sandburg, *Abraham Lincoln*, Vol. II, p. 167.

must be allowed a reasonable choice of the means by which they will discharge the tremendous responsibility imposed on them so that they may achieve the victory through which constitutional rights once more will be secure.

Dated, San Francisco, California,
May 7, 1943.

Respectfully submitted,

ROBERT W. KENNY,
Attorney General of the State of California,

I. H. VAN WINKLE,
Attorney General of the State of Oregon,

SMITH TROY,
Attorney General of the State of Washington,

FRED E. LEWIS,
Chief Assistant and Acting Attorney General of the State of Washington,

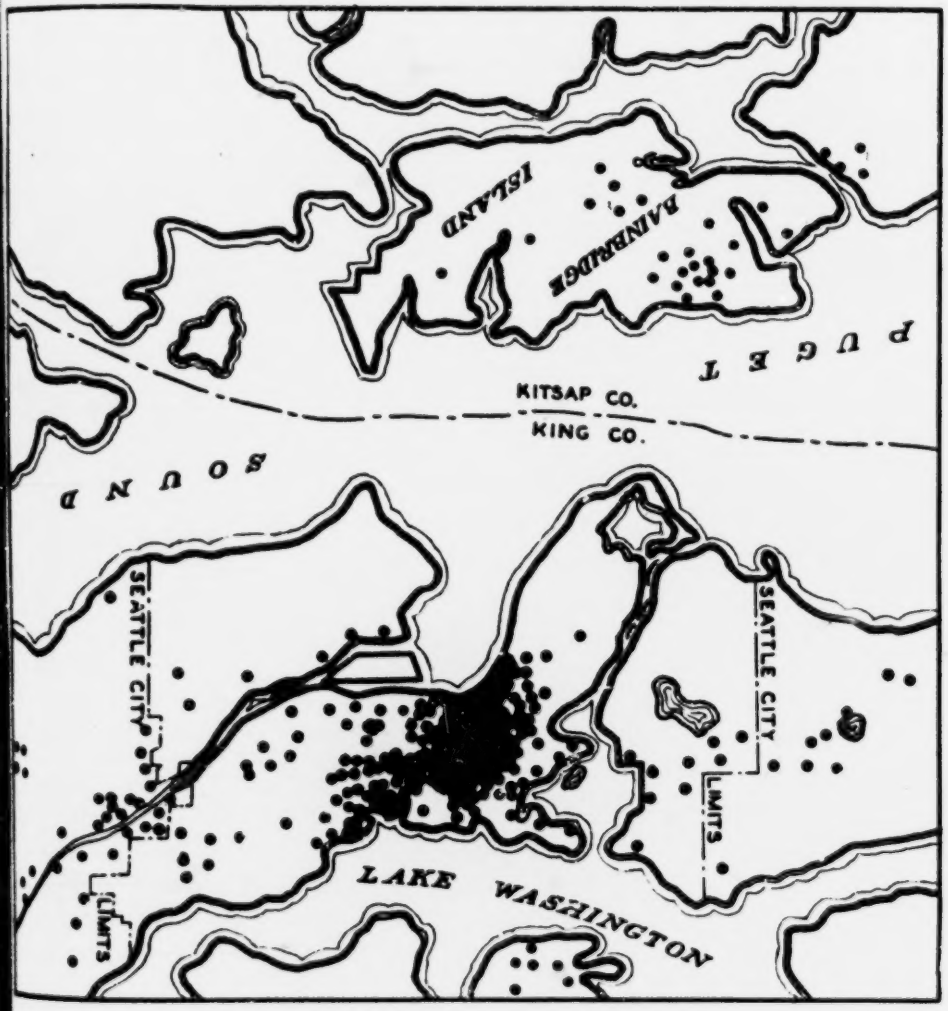
*Attorneys for said States*
*as Amici Curiae.*

**(Appendix Follows.)**

# Appendix

**DOT POPULATION CHARTS REPRESENTING THE CONCENTRATION OF PERSONS OF JAPANESE ANCESTRY IN THE SEATTLE, SAN FRANCISCO AND LOS ANGELES METROPOLITAN AREAS IN THE VICINITY OF IMPORTANT MILITARY AND NAVAL ESTABLISHMENTS, NATIONAL PLANTS AND UTILITIES.**

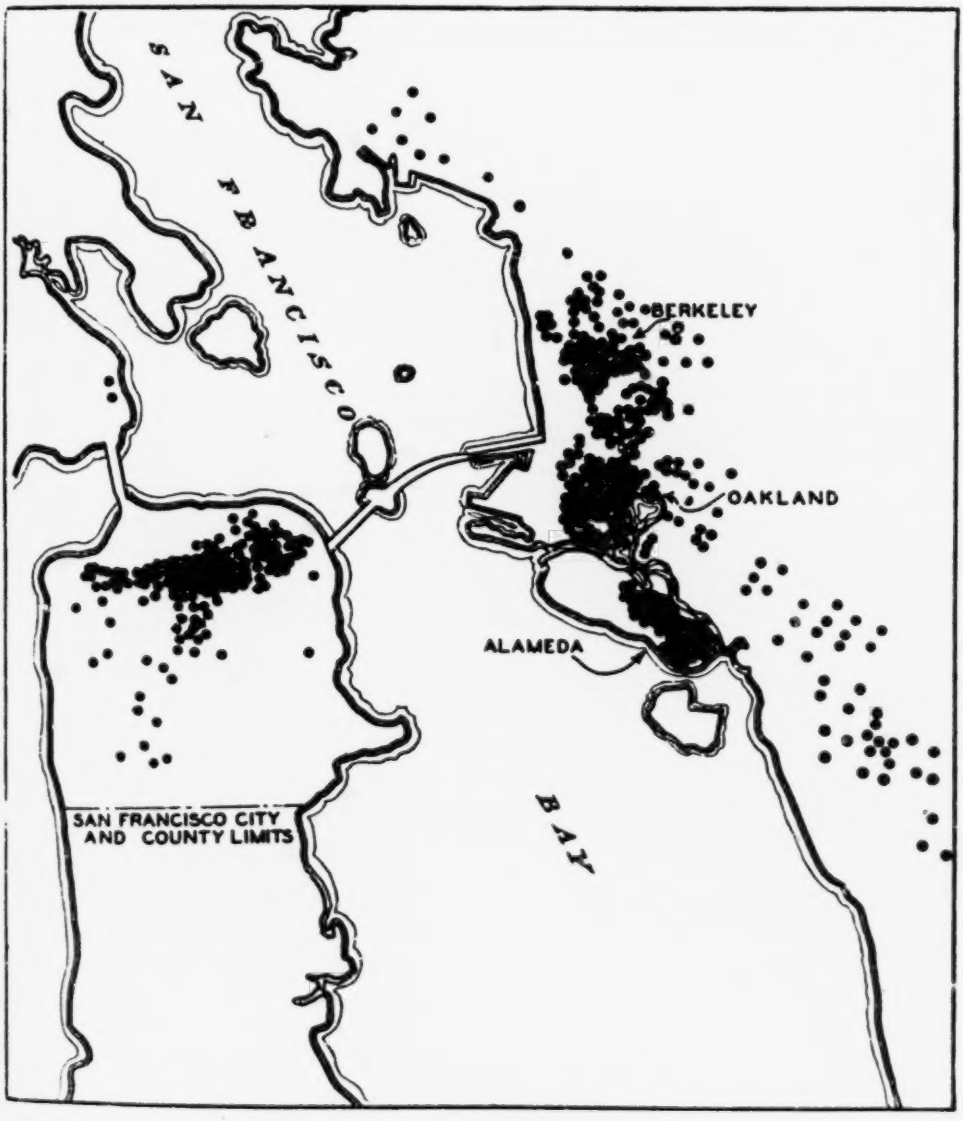
## JAPANESE POPULATION—SEATTLE METROPOLITAN AREA




Legend: Each dot represents ten people

**Chart 7.**

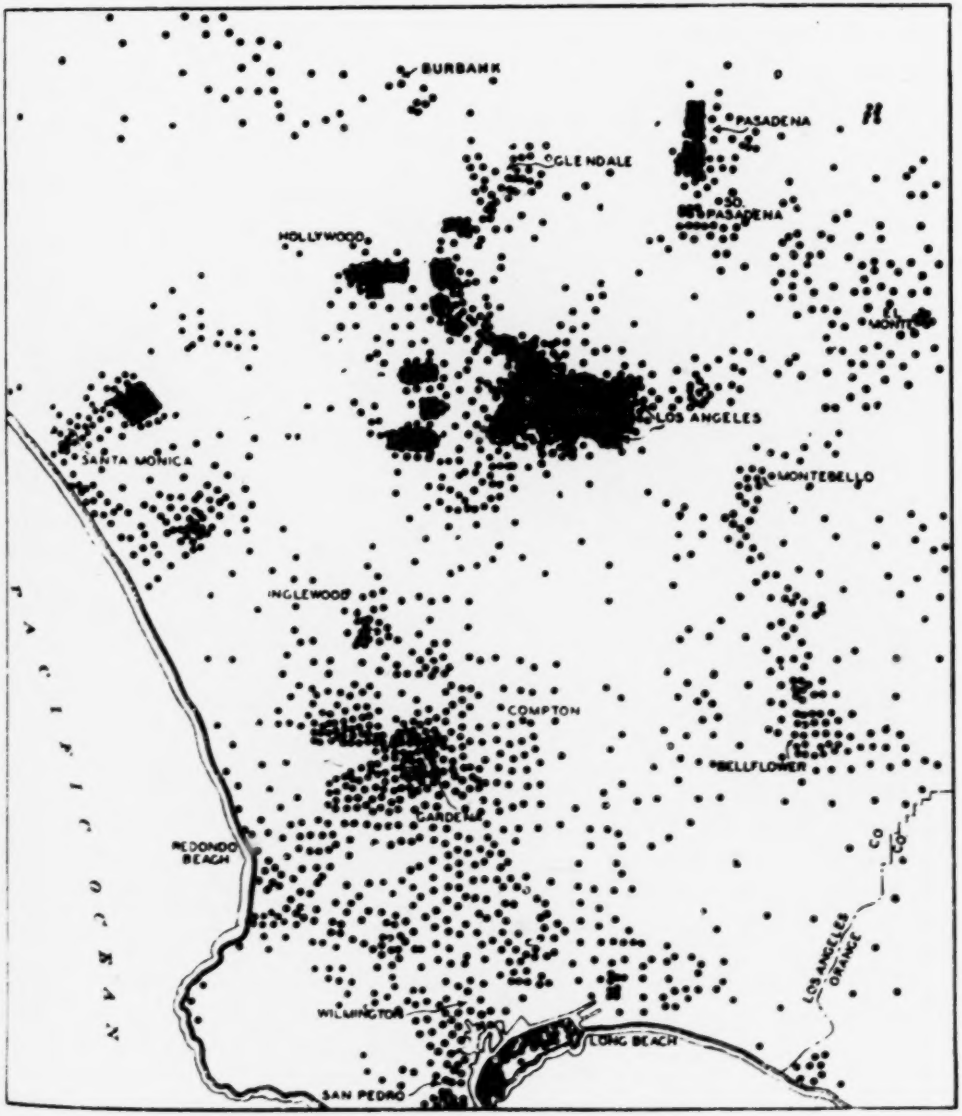
## JAPANESE POPULATION—SAN FRANCISCO BAY AREA




Legend: Each dot represents ten people

**Chart 8.**

## JAPANESE POPULATION—LOS ANGELES METROPOLITAN AREA




Legend: Each dot represents ten people

**Chart 9.**

# SUPREME COURT OF THE UNITED STATES.

No. 870.—October Term, 1942.

Gordon Kiyoshi Hirabayashi, *vs.* The United States of America. } On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[June 21, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Appellant, an American citizen of Japanese ancestry, was convicted in the district court of violating the Act of Congress of March 21, 1942, 56 Stat. 173, which makes it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President.

The questions for our decision are whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p. m. and 6:00 a. m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.

The indictment is in two counts. The second charges that appellant, being a person of Japanese ancestry, had on a specified date, contrary to a restriction promulgated by the military commander of the Western Defense Command, Fourth Army, failed to remain in his place of residence in the designated military area between the hours of 8:00 o'clock p. m. and 6:00 a. m. The first count charges that appellant, on May 11 and 12, 1942, had, contrary to a Civilian Exclusion Order issued by the military commander, failed to report to the Civil Control Station within the designated area, it appearing that appellant's required presence there was a preliminary step to the exclusion from that area of persons of Japanese ancestry.

By demurrer and plea in abatement, which the court overruled (46 F. Supp. 657), appellant asserted that the indictment should be dismissed because he was an American citizen who had never

been a subject of and had never borne allegiance to the Empire of Japan, and also because the Act of March 21, 1942, was an unconstitutional delegation of Congressional power. On the trial to a jury it appeared that appellant was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; that he was educated in the Washington public schools and at the time of his arrest was a senior in the University of Washington; that he had never been in Japan or had any association with Japanese residing there.

The evidence showed that appellant had failed to report to the Civil Control Station on May 11 or May 12, 1942, as directed, to register for evacuation from the military area. He admitted failure to do so, and stated it had at all times been his belief that he would be waiving his rights as an American citizen by so doing. The evidence also showed that for like reason he was away from his place of residence after 8:00 p. m. on May 9, 1942. The jury returned a verdict of guilty on both counts and appellant was sentenced to imprisonment for a term of three months on each, the sentences to run concurrently.

On appeal the Court of Appeals for the Ninth Circuit certified to us questions of law upon which it desired instructions for the decision of the case. See § 239 of the Judicial Code as amended, 28 U. S. C. § 346. Acting under the authority conferred upon us by that section we ordered that the entire record be certified to this Court so that we might proceed to a decision of the matter in controversy in the same manner as if it had been brought here by appeal. 318 U. S. —. Since the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained. *Brooks* v. *United States*, 267 U. S. 432, 441; *Gorin* v. *United States*, 312 U. S. 19, 33.

The curfew order which appellant violated, and to which the sanction prescribed by the Act of Congress has been deemed to attach, purported to be issued pursuant to an Executive Order of the President. In passing upon the authority of the military commander to make and execute the order, it becomes necessary to consider in some detail the official action which preceded or accompanied the order and from which it derives its purported authority.

On December 8, 1941, one day after the bombing of Pearl Harbor by a Japanese air force, Congress declared war against Japan. 55 Stat. 795. On February 19, 1942, the President promulgated Executive Order No. 9066. 7 Federal Register 1407. The Order recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655". By virtue of the authority vested in him as President and as Commander in Chief of the Army and Navy, the President purported to

"authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."

On February 20, 1942, the Secretary of War designated Lt. General J. L. DeWitt as Military Commander of the Western Defense Command, comprising the Pacific Coast states and some others, to carry out there the duties prescribed by Executive Order No. 9066. On March 2, 1942, General DeWitt promulgated Public Proclamation No. 1. 7 Federal Register 2320. The proclamation recited that the entire Pacific Coast "by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations". It stated that "the present situation requires as matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof"; it specified and designated as military areas certain areas within the Western Defense Command; and it declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, but might be permitted to enter or remain in certain others, under regulations

Briefs.

and restrictions to be later prescribed. Among the military areas so designated by Public Proclamation No. 1 was Military Area No. 1, which embraced, besides the southern part of Arizona, all the coastal region of the three Pacific Coast states, including the City of Seattle, Washington, where appellant resided. Military Area No. 2, designated by the same proclamation, included those parts of the coastal states and of Arizona not placed within Military Area No. 1.

Public Proclamation No. 2 of March 16, 1942, issued by General DeWitt, made like recitals and designated further military areas and zones. It contained like provisions concerning the exclusion, by subsequent proclamation, of certain persons or classes of persons from these areas, and the future promulgation of regulations and restrictions applicable to persons remaining within them. 7 Federal Register 2405.

An Executive Order of the President, No. 9102, of March 18, 1942, established the War Relocation Authority, in the Office for Emergency Management of the Executive Office of the President; it authorized the Director of War Relocation Authority to formulate and effectuate a program for the removal, relocation, maintenance and supervision of persons designated under Executive Order No. 9066, already referred to; and it conferred on the Director authority to prescribe regulations necessary or desirable to promote the effective execution of the program. 7 Federal Register 2165.

Congress, by the Act of March 21, 1942, provided: "That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable" to fine or imprisonment, or both.

Three days later, on March 24, 1942, General DeWitt issued Public Proclamation No. 3. 7 Federal Register 2543. After referring to the previous designation of military areas by Public Proclamations No. 1 and 2, it recited that " . . . the present

situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanase ancestry within said Military Areas and Zones . . ." It accordingly declared and established that from and after March 27, 1942, "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P. M. and 6 A. M., which period is hereinafter referred to as the hours of curfew". It also imposed certain other restrictions on persons of Japanese ancestry, and provided that any person violating the regulations would be subject to the criminal penalties provided by the Act of Congress of March 21, 1942.

Beginning on March 24, 1942, the military commander issued a series of Civilian Exclusion Orders pursuant to the provisions of Public Proclamation No. 1. Each such order related to a specified area within the territory of his command. The order applicable to appellant was Civilian Exclusion Order No. 57 of May 10, 1942. 7 Federal Register 3725. It directed that from and after 12:00 noon, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from a specified portion of Military Area No. 1 in Seattle, including appellant's place of residence, and it required a member of each family, and each individual living alone, affected by the order to report on May 11 or May 12 to a designated Civil Control Station in Seattle. Meanwhile the military commander had issued Public Proclamation No. 4 of March 27, 1942, which recited the necessity of providing for the orderly evacuation and resettlement of Japanese within the area, and prohibited all alien Japanese and all persons of Japanese ancestry from leaving the military area until future orders should permit. 7 Federal Register 2601.

Appellant does not deny that he knowingly failed to obey the curfew order as charged in the second count of the indictment, or that the order was authorized by the terms of Executive Order No. 9066, or that the challenged Act of Congress purports to punish with criminal penalties disobedience of such an order. His contentions are only that Congress unconstitutionally delegated its legislative power to the military commander by authorizing him to impose the challenged regulation, and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibits the discrimination made between citi-

zens of Japanese descent and those of other ancestry.

It will be evident from the legislative history that the Act of March 21, 1942, contemplated and authorized the curfew order which we have before us. The bill which became the Act of March 21, 1942, was introduced in the Senate on March 9th and in the House on March 10th at the request of the Secretary of War who, in letters to the Chairman of the Senate Committee on Military Affairs and to the Speaker of the House, stated explicitly that its purpose was to provide means for the enforcement of orders issued under Executive Order No. 9066. This appears in the committee reports on the bill, which set out in full the Executive Order and the Secretary's letter. 88 Cong. Rec. 2722, 2725; H. R. Rep. No. 1906, 77th Cong., 2d Sess.; S. Rep. No. 1171, 77th Cong., 2d Sess. And each of the committee reports expressly mentions curfew orders as one of the types of restrictions which it was deemed desirable to enforce by criminal sanctions.

When the bill was under consideration, General DeWitt had published his Proclamation No. 1 of March 2, 1942, establishing Military Areas Nos. 1 and 2, and that Proclamation was before Congress. S. Rep. No. 1171, 77th Cong., 2d Sess., p. 2; see also 88 Cong. Rec. 2724. A letter of the Secretary to the Chairman of the House Military Affairs Committee, of March 14, 1942, informed Congress that "General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones"; and that General DeWitt had "indicated that he was prepared to enforce certain restrictions at once for the purpose of protecting certain vital national defense interests but did not desire to proceed until enforcement machinery had been set up". H. R. Rep. No. 1906, 77th Cong., 2d Sess., p. 3. See also letter of the Acting Secretary of War to the Chairman of the Senate Military Affairs Committee, March 13, 1942, 88 Cong. Rec. 2725.

The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that "evacuation of the first Japanese aliens and American-born Japanese" was about to

begin. He also stated to the Senate that "reasons for suspected widespread fifth-column activity among Japanese" were to be found in the system of dual citizenship which Japan deemed applicable to American-born Japanese, and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American-born children of Japanese. Such was stated to be the explanation of the contemplated evacuation from the Pacific Coast area of persons of Japanese ancestry, citizens as well as aliens. 88 Cong. Rec. 2722-26; see also pp. 2729-30. Congress also had before it the Preliminary Report of a House Committee investigating national defense migration, of March 19, 1942, which approved the provisions of Executive Order No. 9066, and which recommended the evacuation, from military areas established under the Order, of all persons of Japanese ancestry, including citizens. H. R. Rep. No. 1911, 77th Cong., 2d Sess. The proposed legislation provided criminal sanctions for violation of orders, in terms broad enough to include the curfew order now before us, and the legislative history demonstrates that Congress was advised that curfew orders were among those intended, and was advised also that regulation of citizen and alien Japanese alike was contemplated.

The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. *Prize Cases,* 2 Black 635, 671; *Hamilton* v. *Dillin,* 21 Wall. 73, 96-97; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382-84; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146-48; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300-03; *Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208. And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of. We must consider also whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order and whether the

order itself was an appropriate means of carrying out the Executive Order for the "protection against espionage and against sabotage" to national defense materials, premises and utilities. For reasons presently to be stated, we conclude that it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power.

Executive Order No. 9066, promulgated in time of war for the declared purpose of prosecuting the war by protecting national defense resources from sabotage and espionage, and the Act of March 21, 1942, ratifying and confirming the Executive Order, were each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution. See *Ex parte Quirin,* 317 U. S. 1, 25-26. We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. For the President's action has the support of the Act of Congress, and we are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure. The exercise of that power here involves no question of martial law or trial by military tribunal. Cf. *Ex parte Milligan,* 4 Wall. 2; *Ex parte Quirin, supra.* Appellant has been tried and convicted in the civil courts and has been subjected to penalties prescribed by Congress for the acts committed.

The war power of the national government is "the power to wage war successfully". See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. *Prize Cases, supra; Miller* v. *United States,* 11 Wall. 268, 303-14; *Stewart* v. *Kahn,* 11 Wall. 493, 506-07; *Selective Draft Law Cases,* 245 U. S. 366; *McKinley* v. *United States,* 249 U. S. 397; *United States* v. *Macintosh,* 283 U. S. 605, 622-23.

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. *Ex parte Quirin, supra,* 28-29; cf. *Prize Cases, supra,* 670; *Martin* v. *Mott,* 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which, since disclosed, were then peculiarly within the knowledge of the military authorities. On December 7, 1941, the Japanese air forces had attacked the United States Naval Base at Pearl Harbor without warning, at the very hour when Japanese diplomatic representatives were conducting negotiations with our State Department ostensibly for the peaceful settlement of differences between the two countries. Simultaneously or nearly so, the Japanese attacked Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands. On the following day their army invaded Thailand. Shortly afterwards they sank two British battleships. On December 13th, Guam was taken. On December 24th and 25th they captured Wake Island and occupied Hong Kong. On January 2, 1942, Manila fell, and on February 10th Singapore, Britain's great naval base in the East, was taken. On February 27th the battle of the Java Sea resulted in a disastrous naval defeat to the United Nations. By the 9th of March Japanese forces had established control over the Netherlands East Indies; Rangoon and Burma were occupied; Bataan and Corregidor were under attack.

Although the results of the attack on Pearl Harbor were not fully disclosed until much later, it was known that the damage was extensive, and that the Japanese by their successes had gained a naval superiority over our forces in the Pacific which might enable them to seize Pearl Harbor, our largest naval base and the last stronghold of defense lying between Japan and the west coast. That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding

that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.

The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage. As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion. The alternative which appellant insists must be accepted is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.

When the orders were promulgated there was a vast concentration, within Military Areas No. 1 and 2, of installations and facilities for the production of military equipment, especially ships and airplanes. Important Army and Navy bases were located in California and Washington. Approximately one-fourth of the total value of the major aircraft contracts then let by Government procurement officers were to be performed in the State of California. California ranked second, and Washington fifth, of all the states of the Union with respect to the value of shipbuilding contracts to be performed.[1]

In the critical days of March, 1942, the danger to our war production by sabotage and espionage in this area seems obvious.

[1] State Distribution of War Supply and Facility Contracts—June 1940 through December 1941 (issued by Office of Production Management, Bureau of Research and Statistics, January 18, 1942); *Ibid.*—Cumulative through February 1943 (issued by War Production Board, Statistics Division, April 3, 1943).

The German invasion of the Western European countries had given ample warning to the world of the menace of the "fifth column". Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor.[2] At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. Of the 126,000 persons of Japanese descent in the United States, citizens and non-citizens, approximately 112,000 resided in California, Oregon and Washington at the time of the adoption of the military regulations. Of these approximately two-thirds are citizens because born in the United States. Not only did the great majority of such persons reside within the Pacific Coast states but they were concentrated in or near three of the large cities, Seattle, Portland and Los Angeles, all in Military Area No. 1.[3]

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.[4] In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nation-

[2] See "Attack upon Pearl Harbor by Japanese Armed Forces", Report of the Commission Appointed by the President, dated January 23, 1942, S. Doc. No. 159, 77th Cong., 2d Sess., pp. 12-13.

[3] Sixteenth Census of the United States, for 1940, Population, Second Series, Characteristics of the Population (Dep't. of Commerce): California, pp. 10, 61; Oregon, pp. 10, 50; Washington, pp. 10, 52. See also H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 91-100.

[4] Federal legislation has denied to the Japanese citizenship by naturalization (R. S. § 2169; 8 U. S. C. § 703; see Ozawa v. United States, 260 U. S. 178), and the Immigration Act of 1924 excluded them from admission into the United States. 43 Stat. 161, 8 U. S. C. § 213. State legislation has denied to alien Japanese the privilege of owning land. 1 California General Laws (Deering, 1931), Act 261; 5 Oregon Comp. Laws Ann. (1940), § 61-102; 11 Washington Rev. Stat. Ann. (Remington, 1933), §§ 10581-10582. It has also sought to prohibit intermarriage of persons of Japanese race with Caucasians. Montana Rev. Codes (1935), § 5702. Persons of Japanese descent have often been unable to secure professional or skilled employment except in association with others of that descent, and sufficient employment opportunities of this character have not been available. Mears, Resident Orientals on the American Pacific Coast (1927), pp. 188, 198-209, 402-03; H. R. Rep. No. 2124, 77th Cong., 2d Sess., pp. 101-38.

alistic propaganda, cultivating allegiance to Japan.[5] Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.[6]

Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents, and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan.[7] No official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large.[8]

The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. The association of influential Japanese residents with Japanese Consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country.[9]

As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation,

---

[5] Hearings before the Select Committee Investigating National Defense Migration, House of Representatives, 77th Cong., 2d Sess., pp. 11702, 11393-94, 11348.

[6] H. R. Rep. No. 1911, 77th Cong., 2d Sess., p. 16.

[7] Nationality Law of Japan, Article 1 and Article 20, § 3, and Regulations (Ordinance No. 26) of November 17, 1924,—all printed in Flournoy and Hudson, Nationality Laws (1929), pp. 382, 384-87. See also Foreign Relations of the United States, 1924, vol. 2, pp. 411-13.

[8] Statistics released in 1927 by the Consul General of Japan at San Francisco asserted that over 51,000 of the approximately 63,000 American-born persons of Japanese parentage then in the western part of the United States held Japanese citizenship. Mears, Resident Orientals on the American Pacific Coast, pp. 107-08, 429. A census conducted under the auspices of the Japanese government in 1930 asserted that approximately 47% of American-born persons of Japanese parentage in California held dual citizenship. Strong, The Second-Generation Japanese Problem (1934), p. 142.

[9] H. R. Rep. No. 1911, 77th Cong., 2d Sess., p. 17.

and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack. The extent of that danger could be definitely known only after the event and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Appellant does not deny that, given the danger, a curfew was an appropriate measure against sabotage. It is an obvious protection against the perpetration of sabotage most readily committed during the hours of darkness. If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right. Like them, the validity of the restraints of the curfew order depends on all the conditions which obtain at the time the curfew is imposed and which support the order imposing it.

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. *Detroit Bank* v. *United States*,

317 U. S. 329, 337-38, and cases cited. Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500; *Hill* v. *Texas*, 316 U. S. 400. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. "We must never forget, that it is *a constitution* we are expounding", "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs". *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415. The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant. Cf. *Clarke* v. *Deckebach*, 274 U. S. 392, and cases cited.

Here the aim of Congress and the Executive was the protection against sabotage of war materials and utilities in areas thought to be in danger of Japanese invasion and air attack. We have stated in detail facts and circumstances with respect to the American citizens of Japanese ancestry residing on the Pacific Coast which support the judgment of the war-waging branches of the Government that some restrictive measure was urgent. We cannot say

that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States. The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.

Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

What we have said also disposes of the contention that the curfew order involved an unlawful delegation by Congress of its legislative power. The mandate of the Constitution that all legislative power granted "shall be vested in Congress" has never been thought, even in the administration of civil affairs, to preclude Congress from resorting to the aid of executive or administrative officers in determining by findings whether the facts are such as to call for the application of previously adopted legislative standards or definitions of Congressional policy.

The purpose of Executive Order No. 9066, and the standard which the President approved for the orders authorized to be promulgated by the military commander—as disclosed by the preamble of the Executive Order—was the protection of our war resources against espionage and sabotage. Public Proclamations No. 1 and 2, by General DeWitt, contain findings that the military areas created and the measures to be prescribed for them were required to establish safeguards against espionage and sabotage.

Both the Executive Order and the Proclamations were before Congress when the Act of March 21, 1942, was under consideration. To the extent that the Executive Order authorized orders to be promulgated by the military commander to accomplish the declared purpose of the Order, and to the extent that the findings in the Proclamations establish that such was their purpose, both have been approved by Congress.

It is true that the Act does not in terms establish a particular standard to which orders of the military commander are to conform, or require findings to be made as a prerequisite to any order. But the Executive Order, the Proclamations and the statute are not to be read in isolation from each other. They were parts of a single program and must be judged as such. The Act of March 21, 1942, was an adoption by Congress of the Executive Order and of the Proclamations. The Proclamations themselves followed a standard authorized by the Executive Order—the necessity of protecting military resources in the designated areas against espionage and sabotage. And by the Act, Congress gave its approval to that standard. We have no need to consider now the validity of action if taken by the military commander without conforming to this standard approved by Congress, or the validity of orders made without the support of findings showing that they do so conform. Here the findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made. General DeWitt's Public Proclamation No. 3, which established the curfew, merely prescribed regulations of the type and in the manner which Public Proclamations No. 1 and 2 had announced would be prescribed at a future date, and was thus founded on the findings of Proclamations No. 1 and 2.

The military commander's appraisal of facts in the light of the authorized standard, and the inferences which he drew from those facts, involved the exercise of his informed judgment. But as we have seen, those facts, and the inferences which could be rationally drawn from them, support the judgment of the military commander, that the danger of espionage and sabotage to our military resources was imminent, and that the curfew order was an appropriate measure to meet it.

Where, as in the present case, the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders, so that

Congress, the courts and the public are assured that the orders, in the judgment of the commander, conform to the standards approved by the President and Congress, there is no failure in the performance of the legislative function. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 142-46, and cases cited. The essentials of that function are the determination by Congress of the legislative policy and its approval of a rule of conduct to carry that policy into execution. The very necessities which attend the conduct of military operations in time of war in this instance as in many others preclude Congress from holding committee meetings to determine whether there is danger, before it enacts legislation to combat the danger.

The Constitution as a continuously operating charter of government does not demand the impossible or the impractical. The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. Cf. *The Aurora*, 7 Cranch 382; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12. The present statute, which authorized curfew orders to be made pursuant to Executive Order No. 9066 for the protection of war resources from espionage and sabotage, satisfies those requirements. Under the Executive Order the basic facts, determined by the military commander in the light of knowledge then available, were whether that danger existed and whether a curfew order was an appropriate means of minimizing the danger. Since his findings to that effect were, as we have said, not without adequate support, the legislative function was performed and the sanction of the statute attached to violations of the curfew order. It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.

The conviction under the second count is without constitutional infirmity. Hence we have no occasion to review the conviction on the first count since, as already stated, the sentences on the two counts are to run concurrently and conviction on the second is sufficient to sustain the sentence. For this reason also it is unnecessary to consider the Government's argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.

*Affirmed.*

Mr. Justice DOUGLAS concurring.

While I concur in the result and agree substantially with the opinion of the Court, I wish to add a few words to indicate what for me is the narrow ground of decision.

After the disastrous bombing of Pearl Harbor the military had a grave problem on its hands. The threat of Japanese invasion of the west coast was not fanciful but real. The presence of many thousands of aliens and citizens of Japanese ancestry in or near to the key points along that coast line aroused special concern in those charged with the defense of the country. They believed that not only among aliens but also among citizens of Japanese ancestry there were those who would give aid and comfort to the Japanese invader and act as a fifth column before and during an invasion.[1] If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency. We must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties. We cannot possibly know all the facts which lay behind that decision. Some of them may have been as intangible and as imponderable as the factors which influence personal or business decisions in daily life. The point is that we cannot sit in judgment on the military requirements of that hour. Where the orders under the present Act have some relation to "protection against espionage and against sabotage", our task is at an end.

Much of the argument assumes that as a matter of policy it might have been wiser for the military to have dealt with these people on an individual basis and through the process of investigation and hearings separated those who were loyal from those who were not. But the wisdom or expediency of the decision which was made is not for us to review. Nor are we warranted where national survival is at stake in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty.

[1] Judge Fee stated in United States v. Yasui, 48 Fed. Supp. 40, 44-45, the companion case to the present one, "The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order."

The orders as applied to the petitioner are not to be tested by the substantial evidence rule. Peacetime procedures do not necessarily fit wartime needs. It is said that if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the number of those who are finally shown to be disloyal or suspect is reduced to a small per cent. The sorting process might indeed be as time-consuming whether those who were disloyal or suspect constituted nine or ninety-nine per cent. And the pinch of the order on the loyal citizens would be as great in any case. But where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. Nor should the military be required to wait until espionage or sabotage becomes effective before it moves.

It is true that we might now say that there was ample time to handle the problem on the individual rather than the group basis. But military decisions must be made without the benefit of hindsight. The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed. At that time further delay might indeed have seemed to be wholly incompatible with military responsibilities.

Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis. Petitioner therefore was not justified in disobeying the orders.

But I think it important to emphasize that we are dealing here with a problem of loyalty not assimilation. Loyalty is a matter of mind and of heart not of race. That indeed is the history of America. Moreover, guilt is personal under our constitutional system. Detention for reasonable cause is one thing. Detention on account of ancestry is another.

In this case the petitioner tendered by a plea in abatement the question of his loyalty to the United States. I think that

plea was properly stricken; military measures of defense might be paralyzed if it were necessary to try out that issue preliminarily. But a denial of that opportunity in this case does not necessarily mean that petitioner could not have had a hearing on that issue in some appropriate proceeding. Obedience to the military orders is one thing. Whether an individual member of a group must be afforded at some stage an opportunity to show that, being loyal, he should be reclassified is a wholly different question.

There are other instances in the law where one must obey an order before he can attack as erroneous the classification in which he has been placed. Thus it is commonly held that one who is a conscientious objector has no privilege to defy the Selective Service Act and to refuse or fail to be inducted. He must submit to the law. But that line of authority holds that after induction he may obtain through *habeas corpus* a hearing on the legality of his classification by the draft board.[2] Whether in the present situation that remedy would be available is one of the large and important issues reserved by the present decision. It has been suggested that an administrative procedure has been established to relieve against unwarranted applications of these orders. Whether in that event the administrative remedy would be the only one available or would have to be first exhausted is also reserved. The scope of any relief which might be afforded—whether the liberties of an applicant could be restored only outside the areas in question—is likewise a distinct issue. But if it were plain that no machinery was available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented. The United States, however, takes no such position. We need go no further here than to deny the individual the right to defy the law. It is sufficient to say that he cannot test in that way the validity of the orders as applied to him.

---

[2] See United States *v.* Powell, 38 F. Supp. 183; Application of Greenberg, 39 F. Supp. 13; United States *v.* Baird, 39 F. Supp. 392; Micheli *v.* Paullin, 45 F. Supp. 687; United States *v.* Embrey, 46 F. Supp. 916; In re Rogers, 47 F. Supp. 265; Ex parte Stewart, 47 F. Supp. 410; United States *v.* Smith, 48 F. Supp. 842; Ex parte Robert, 49 F. Supp. 131; United States *v.* Grieme, 128 F. 2d 811; Fletcher *v.* United States, 129 F. 2d 262; Drumheller *v.* Berks County Local Board No. 1, 130 F. 2d 610, 612. For cases arising under the Selective Draft Act of 1917, see United States *v.* Kinkead, 250 Fed. 692; Ex parte McDonald, 253 Fed. 99; Ex parte Cohen, 254 Fed. 711; Arbitman *v.* Woodside, 258 Fed. 441; Ex parte Thierat, 268 Fed. 472, 476. And see 10 Geo. Wash. L. Rev. 827.

Mr. Justice MURPHY, concurring.

It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security. Neither is it doubted that the Congress and the Executive working together may generally employ such measures as are necessary and appropriate to provide for the common defense and to wage war "with all the force necessary to make it effective." *United States* v. *Macintosh*, 283 U. S. 605, 622. This includes authority to exercise measures of control over persons and property which would not in all cases be permissible in normal times.[1]

It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war. It has been frequently stated and recognized by this Court that the war power, like the other great substantive powers of government, is subject to the limitations of the Constitution. See *Ex parte Milligan*, 4 Wall. 2; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426. We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war (see *Ex parte Quirin*, 317 U. S. 1) could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law. Cf. *Ex parte Milligan*, *supra*.

Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has

[1] Schenck v. United States, 249 U. S. 47; Debs v. United States, 249 U. S. 211; United States v. Bethlehem Steel Corp., 315 U. S. 289, 305; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Dakota Cent. Tel. Co. v. South Dakota, 250 U. S. 163; Highland v. Russell Car Co., 279 U. S. 253; Selective Draft Law Cases, 245 U. S. 366.

been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. We have consistently held that attempts to apply regulatory action to particular groups solely on the basis of racial distinction or classification is not in accordance with due process of law as prescribed by the Fifth and Fourteenth Amendments. Cf. *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 369; *Yu Con Eng* v. *Trinidad*, 271 U. S. 500, 524-28. See also *Boyd* v. *Frankfort*, 117 Ky. 119; *Opinion of the Justices*, 207 Mass. 601. It is true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. Cf. *Currin* v. *Wallace*, 306 U. S. 1, 14. It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, how-

ever, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment.[2] I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage.

In view, however, of the critical military situation which prevailed on the Pacific Coast area in the spring of 1942, and the urgent necessity of taking prompt and effective action to secure defense installations and military operations against the risk of sabotage and espionage, the military authorities should not be required to conform to standards of regulatory action appropriate to normal times. Because of the damage wrought by the Japanese at Pearl Harbor and the availability of new weapons and new techniques with greater capacity for speed and deception in offensive operations, the immediate possibility of an attempt at invasion somewhere along the Pacific Coast had to be reckoned with. However desirable such a procedure might have been, the military authorities could have reasonably concluded at the time that determinations as to the loyalty and dependability of individual members of the large and widely scattered group of persons of Japanese extraction on the West Coast could not be made without delay that might have had tragic consequences. Modern war does not always wait for the observance of procedural requirements that are considered essential and appropriate under normal conditions. Accordingly I think that the military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by the Congress, made an allowable judgment at the time the curfew restriction was imposed. Whether such a restriction is valid today is another matter.

In voting for affirmance of the judgment I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as "military areas". While this Court

[2] For instance, if persons of an accused's race were systematically excluded from a jury in a federal court, any conviction undoubtedly would be considered a violation of the requirement of due process of law, even though the ground commonly stated for setting aside convictions so obtained in state courts is denial of equal protection of the laws. Cf. Glasser v. United States, 315 U. S. 60, with Smith v. Texas, 311 U. S. 128.

sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men. Cf. Mr. Justice Brandeis concurring in *Whitney* v. *California*, 274 U. S. 357, 372.

Nor do I mean to intimate that citizens of a particular racial group whose freedom may be curtailed within an area threatened with attack should be generally prevented from leaving the area and going at large in other areas that are not in danger of attack and where special precautions are not needed. Their status as citizens, though subject to requirements of national security and military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.

---

Mr. Justice RUTLEDGE, concurring.

I concur in the Court's opinion, except for the suggestion, if that is intended (as to which I make no assertion), that the courts have no power to review any action a military officer may "in his discretion" find it necessary to take with respect to civilian citizens in military areas or zones, once it is found that an emergency has created the conditions requiring or justifying the creation of the area or zone and the institution of some degree of military control short of suspending habeas corpus. Given the generating conditions for exercise of military authority and recognizing the wide latitude for particular applications that ordinarily creates, I do not think it is necessary in this case to decide that there is no action a person in the position of General De Witt here may take, and which he may regard as necessary to the region's or the country's safety, which will call judicial power into play. The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen. But in this case that question need not be faced and I merely add my reservation without indication of opinion concerning it.